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A
TREATISE
ON
THE LAW OF
BILLS OF EXCHANGE,
PROMISSORY-NOTES, BANK-NOTES,
BANKERS' NOTES, AND CHECKS ON BANKERS,
IN SCOTLAND.



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BILLS OF EXCHANGE,
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BANKERS' NOTES, AND CHECKS ON BANKERS,
IN SCOTLAND ;

INCLUDING
THE LATEST ENGLISH DECISIONS AND AUTHORITIES
APPLICABLE TO THE LAW OF SCOTLAND.



SECOND EDITION, CAREFULLY REVISED.

By **ROBERT THOMSON, Esq.**
ADVOCATE.

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TO
THE HON. GEORGE CRANSTOUN
OF COREHOUSE,
ONE OF THE SENATORS OF THE COLLEGE OF JUSTICE,
WITH PROFOUND RESPECT FOR HIS
EMINENT JUDICIAL CHARACTER AND TALENTS,
AND
WITH THE HIGHEST PERSONAL ESTEEM,
THIS WORK
IS,
BY PERMISSION, INSCRIBED
BY HIS MOST FAITHFUL AND OBEDIENT SERVANT,
ROBERT THOMSON.



ADVERTISEMENT

TO THE

SECOND EDITION.

THE whole of this Work has been again carefully revised, and nearly Nine hundred new cases, Scotch and English, inserted, that it might exhibit as complete a view as I could give of the actual state of the law regarding Bills and Notes in Scotland, and also in England, so far as the principles of English decisions are applicable in Scotland. The favour with which the attempt made in the first edition to elucidate the principles common to the law of both countries, has been received, not only in Scotland, but in England and America, has formed a strong incitement to correct and improve the work. With this view, various discussions and explanations which were deemed necessary in a first attempt to trace the principles common to the law of Scotland and of England, have been suppressed, as no longer required, and I have endeavoured so to condense the whole, that, while no point is omitted, which was noticed in the former edition, new cases and authorities might be added without increasing the size of the work.

The former arrangement of chapters has been retained, as I do not see any objection to the principles on which it was founded, as explained in the Preface.

But the chapters have been divided more into sections than formerly, so as to render them easier for consultation.

Stamp Act.—When the new Stamp Act is passed, I intend to prepare a short summary of its provisions as to Bills and Notes, which shall be furnished *gratis* to the purchasers of the work, and may be bound up with it.

I am indebted to many professional friends for various suggestions tending to improve the work, and to some of them for their great kindness in revising portions of this edition.

A full Table of Contents and *Index Materialium* have been prepared by Mr C. G. Ferguson, the value of whose services in this respect is well known.

It is with sincere anxiety, and a consciousness of imperfections, even after every exertion to remedy them, that I now submit this work to my brethren and the public.

EDINBURGH,
70. Great King Street, }
30th May 1836.

PREFACE.

IN a Practical Treatise on Bills of Exchange and Promissory-notes, it is unnecessary to enter minutely into their history, more especially as it is involved in great obscurity. The leading principle of bills appears to have been in some instances faintly perceived by the ancients; but the discovery of those uses which alone raised them to the rank of an invention was reserved for modern times. At what precise period these documents, in their modern acceptance, were first introduced, is altogether uncertain. But, in all those nations among whom bills, whether foreign or inland, and promissory-notes, have come into complete effect, their progress has followed, with wonderful exactness, the course of commerce. In most countries, foreign commerce has taken the lead, probably from one cause among many others, that a nation, before its capital has accumulated, finds it more advantageous to purchase comforts and luxuries from nations farther advanced, in exchange for its own rude produce, than to engage prematurely in manufactures. But those who, from the course of their dealings, owed money in a foreign country, would naturally wish to save the risk and expense of transmitting it in *specie*, by paying its amount to any person in their own place of residence who had money to receive in this foreign country, and

obtaining from him, in exchange, a draft on his debtor for the same amount, payable to their creditor. Such a draft is a foreign bill. When, in the progress of society, a mutual commerce was established between different parts of the same country, it became important, both to secure the safe and speedy settlement of debts due from one place to another, by procuring drafts from the one place payable in the other ; and also to constitute debts due by one merchant to another in the form of a document which could be transmitted to third parties, so as to afford a fund of credit, if necessary, to the original creditor. Hence arose inland bills, which are drawn by one party on his debtor, payable either to the drawer himself or to a third party, and are in both cases transmissible indefinitely. These documents gradually acquired almost all the privileges of foreign bills. The same privileges were last of all bestowed on promissory-notes, the simplest of commercial documents, whereby a debtor merely obliges himself to pay a certain sum to his creditor. These documents seem to have been first recognised as instruments of commerce, when issued by bankers, payable to the bearer, probably because the currency of such notes was safer, if the bankers were of known credit, and was more essential for the purposes of commerce, than the currency of notes granted by private individuals. But the convenience, even of these notes, in liquidating debts between two individuals, when there was no need for the intervention of a third party, gradually introduced them into such transactions, and gave them at last the currency as well as all the other privileges of bills. The decisions and enactments by which these several documents were brought into their present state

of complete efficacy in Scotland and in England, shall be afterwards noticed.

It is remarkable, that, since the time when bills and notes received full effect in Scotland as commercial documents, no work with regard to them has been published by any individual belonging to the bar. Mr Forbes's Treatise, which is more than a century old, was written long before promissory-notes had acquired the privileges of bills, and before the law of prescription as to bills and notes was introduced; and, although it is a work of great merit, embracing a large share of the learning applicable to bills at its date, especially of that which was to be found in the continental writers, it may be safely said, that the law of bills and notes, so far as it depends on Scotch decisions, was formed since his time. Two editions of a very respectable modern work have appeared on the same subject. But, I believe, it is a pretty general opinion among the profession, that a work giving a full and systematic exposition of the law of Scotland, with regard to bills and notes, as illustrated by the decisions of our Courts down to the present time, is still a *desideratum*. There is one task, likewise, of great delicacy and importance, which has not yet been performed, viz. that of combining in one treatise with the Scotch authorities, those stores of legal knowledge which are afforded by the decisions of the English Courts, so far as the law in Scotland and England has been administered on common principles. It is with sincere diffidence that I now submit to the public, a work which is intended to accomplish these two objects. I have endeavoured, after a careful examination of all the authorities and decisions, Scotch and English, down to

the latest period, to unite them into one Treatise, which may explain the law of bills and notes, agreeably to the principles that are recognised in Scotland. Those who know the hazards incident to the study of a foreign system of law, will sympathise with me in the apprehension, that I may, in a number of instances, have mistaken the application of those English authorities which are cited. But I have used every effort to avoid this risk, by excluding, so far as I could distinguish them, such cases as appeared to turn on points peculiar to English law, while I have tried to avail myself of all those which tended to illustrate the general principles of the law of bills. I have likewise used, for the same purpose, but with the same necessary caution, the works of the leading continental authors on bills, and especially Pothier's admirable work on that subject.

It remains only to state the plan of this Treatise.

Bills and notes, as between solvent parties, may be considered with reference to their constitution and legal effects as complete documents, their transmission, their execution, and their endurance, or their extinction. Their constitution and legal effects are discussed in the first two chapters. The First Chapter relates to the qualities and requisites of bills and notes, including all bankers' notes, as well as drafts on bankers, considered as to their general nature and effects. The Second Chapter treats of them with relation to the different parties who may be bound by them, and the various modes in which these parties may be bound. The Third Chapter relates to their transmission, or their transference by indorsation, or otherwise. The next subject, viz. their execution, comprehends two different cases, viz. 1st, The case when a note is paid, or a bill is

accepted and paid according to its tenor ; and, *2dly*, The opposite case, when, in consequence of the proper debtor failing to accept or pay, the holder has a claim of recourse against the drawer and indorsers. The first of these cases is discussed in Chapters Fourth and Fifth, which treat of Acceptance and of Payment. In the Sixth Chapter, on Negotiation, I have discussed the measures necessary for securing the holder's recourse against the drawer or indorsers, in the event of non-acceptance or non-payment. The natural sequel to this subject is Chapter Seventh, on Action and Diligence, which treats of the legal remedies competent in every case against all the several parties to bills and notes, and the procedure by which these remedies are made available. In the whole of this discussion, it is taken for granted, that bills and notes are subsisting documents. But the fourth head, viz. their extinction, is next discussed in Chapter Eighth, which treats of Prescription.

This arrangement appears to exhaust the subject of bills or notes, on the supposition of the several parties concerned in them remaining solvent. But the title to such documents, their transmission, and the different claims competent on them, may be affected by the insolvency or bankruptcy of the several parties who are in right to them, or are debtors in them ; and, therefore, I have employed the last Chapter in treating the important subject of insolvency and bankruptcy, as affecting bills and notes, considered in these different relations.

In some treatises on bills and notes, letters of credit have been discussed separately. I have conceived it advisable to insert those decisions which relate to letters

of credit as guaranteeing bills or notes, especially those which respect their negotiation, in the body of this work. But I have refrained from entering into the discussion of letters of credit generally, as that forms a subject not at all connected with bills or notes.

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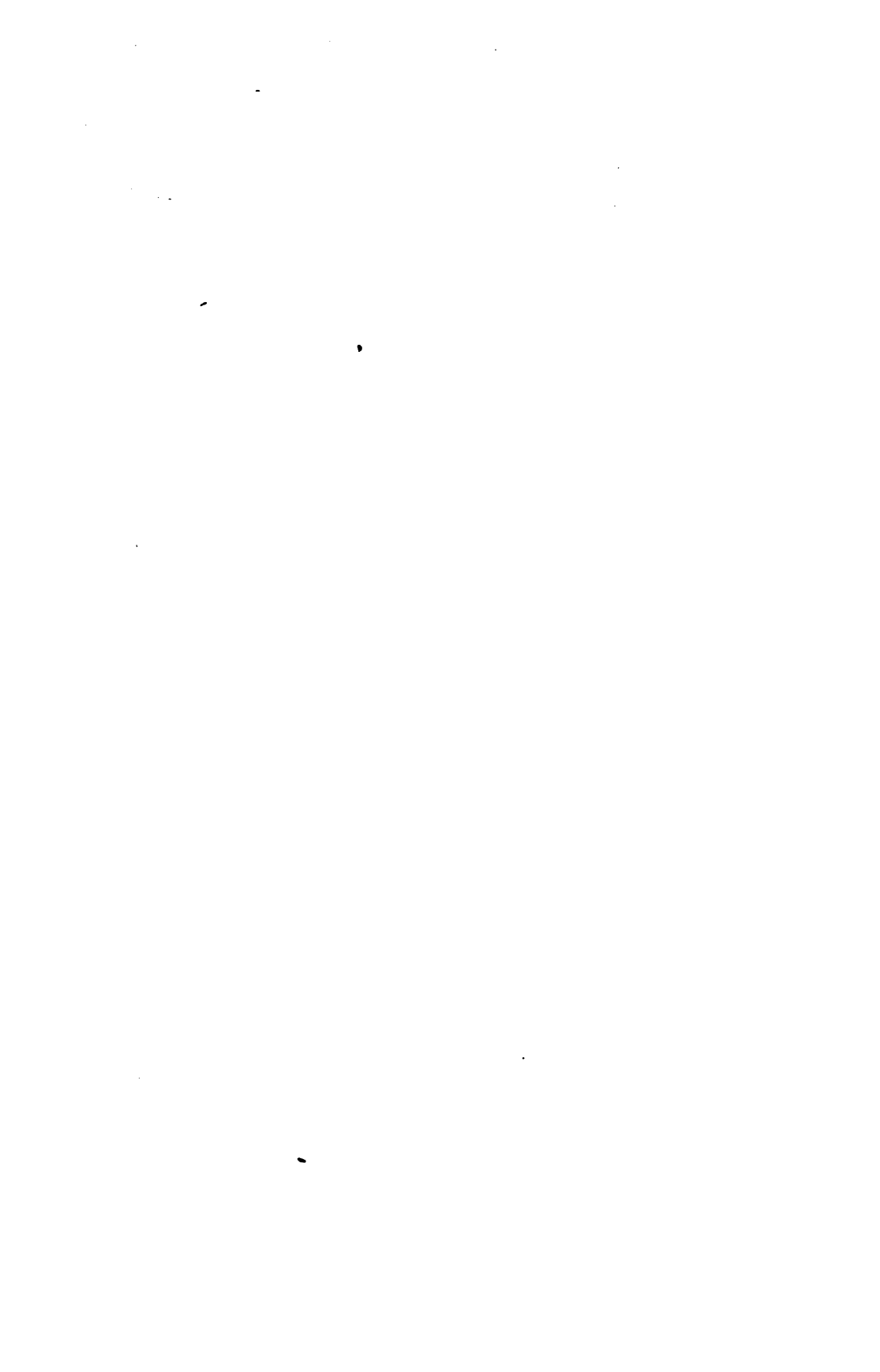
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A

TREATISE

ON

BILLS OF EXCHANGE, PROMISSORY- NOTES, &c.

CHAPTER I.

OF THE REQUISITES AND QUALITIES OF BILLS OF EXCHANGE,
PROMISSORY-NOTES, BANK NOTES, BANKERS' NOTES, AND
CHECKS ON BANKERS.

A BILL OF EXCHANGE is a written request, addressed by a person who is called the drawer, to another person called the drawee, desiring him to pay a certain sum of money, either to the drawer himself, or to a third party, called the payee, within a certain time after its date, or after it is presented for payment, or on demand. If the drawee signs the bill in token of his agreeing to this request, he is called the acceptor.

A promissory-note is a written promise, signed by the granter, whereby he engages to pay a certain sum of money to another person, called the payee, within a specified time after its date, or on demand.

The payee of a bill or note may transfer it to a third party, by writing his name on the back, either simply, or with an order prefixed to pay its amount to a certain individual. He

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is then called the indorser; and the person to whom the right is transferred by the indorsation is called the indorsee or holder. This indorsee may transfer his right by the same means to a third party, and each successive indorsee may do the same.

When a promissory-note is first indorsed, it then resembles a bill of exchange; the payee who has indorsed it being in the situation of drawer, the granter in that of acceptor, and the indorsee in the place of payee of the bill¹.

A bill is either foreign or inland. The former is a bill drawn or payable abroad². Such bills are generally made payable to a different party from the drawer; but there is nothing to prevent him from being likewise payee. An inland bill is drawn on a person living in the same country with the drawer, either in favour of a third party, or of the drawer himself.

In Scotland, payment of bills may be enforced summarily, without an action. This right of summary execution was introduced by the act 1681, c. 20, which enacts, 1st, That, on the observance of certain requisites, to be afterwards stated more particularly, there shall be summary diligence on foreign bills, at the instance of the payee or his order, and that either against the drawer or indorser in case of non-acceptance, or against the acceptor in case of non-payment, for the whole sums contained in the bill; and, 2^{dly}, That, in case of the forms therein prescribed as essential to summary diligence not being observed, no remedy shall be competent on the bill except an ordinary action. The act contains various other provisions, which shall be afterwards explained in detail³. The right of using summary execution was afterwards extended to inland bills by the act 1696, c. 36, which enacts, "That the same execution shall be competent, "and proceed upon inland bills and precepts, as is provided " (by the said act) to pass upon foreign bills of exchange," and "which act is hereby extended to inland bills and precepts in "all points." The act 12 Geo. III. c. 72, contains various

¹ *Per* Lord Mansfield, Burrow's Rep. 609.

² Bayley, p. 26, 5th edition.

³ This subject shall be more fully discussed afterwards, in Chap. VII. on Action and Diligence.

extensions of these acts with regard to summary diligence¹, and in particular, it authorises diligence for non-payment as well as non-acceptance, against the drawers and indorsers as well as the acceptors of bills, conjunctly and severally. Inland bills have, since the date of the act 1696, c. 36, possessed in Scotland all the privileges allowed to foreign bills. On this principle, the Court², after taking the report of merchants as to the practice, decided, in an early case, that separate payments of such a bill, not appearing on the face of it, could not be pleaded against an onerous indorsee. And again³, in the case of an inland bill between two parties only, (though it was pleaded that such a document could not be considered as granted *in re mercatoria*, but merely as a security for debt,) the Court, after full discussion, held, that it was privileged as a bill, insomuch that an onerous indorsee was not liable to a plea of compensation competent against the original drawer.

Promissory-notes in Scotland were not at first allowed almost any of the privileges of bills⁴. But the act 12 Geo. III. c. 72, § 36, (made perpetual by 23 Geo. III. c. 18, § 55,) put an end to this state of things, by enacting, that “the same diligence and execution shall be competent, and shall proceed upon promissory-notes, whether holograph or not, as is provided to pass upon bills of exchange and inland bills by the law of Scotland; and that promissory-notes shall bear interest as bills, and shall pass by indorsation; and that indorsees of promissory-notes shall have the same privileges as indorsees of bills in all points.” Promissory-notes are now therefore altogether in the same situation with bills of exchange.

In England, even foreign bills were, till a comparatively recent period, confined to transactions between merchants, it having been sustained as a defence by the Court of King’s Bench, so late as the reign of William and Mary, against an

¹ *Vide* Chap. VII.

² *Fairholm v. Cockburn*, 24th June 1714, *Morr.* 1506.

³ *Tudhope v. Turnbull*, 18th June 1748, *Morr.* 1437, and 1510.

⁴ *Arbuthnot v. Scott*, 29th Jan. 1708, *Morr.* 12255; *Heriot v. Blyth*, Nov. 1681, *Morr.* 17020; *King v. Eisdale*, *Morr.* 12256; *Bundie v. Kennedy*, 12th Feb. 1708, *Morr.* 12256; *Gordon v. Forbes and Innes*, 2d Feb. 1739, *Morr.* 712, and 12258; *Gillenders v. Birtwhistle*, 17th July 1768, *Morr.* 12259; *Greig v. Green*, 25th Jan. 1771, *Morr.* 12259.

action on a bill of exchange drawn in France, that the defendant was a gentleman, and could not, therefore, be bound by such a document, seeing bills were mercantile documents¹. The judgment, however, was reversed in the Exchequer Chamber on a writ of error; and it was decided that foreign bills were binding generally on all classes. Inland bills, likewise, gradually acquired in England the same privileges with foreign bills, although a distinction is still made between them as to some of the measures necessary for recovering payment and preserving recourse. On this subject the 9 and 10 Will. III. c. 17, and the 3 and 4 Anne, c. 9, § 4, &c. contain certain provisions respecting inland bills, which shall be afterwards noticed. The last-mentioned act, § 1, 2, likewise makes promissory-notes indorsable in the same manner as inland bills of exchange, and confers on them the same privileges and remedies for recovery of payment which are competent by law upon inland bills. It has been decided², that this act of Anne, being general in its application to all promissory-notes, confers on a promissory-note made in Scotland the same privileges as on a note made in England. Bills, therefore, whether foreign or inland, and promissory-notes, are now on the same footing in England as in Scotland with regard to their general requisites and privileges, and most of the rules which apply to the one are applicable to the other.

In the present Chapter we shall consider,

I. Certain qualities and requisites connected with the general nature of bills or notes, and the purposes to which they are applicable.

II. The qualities essential to their form and constitution, and the rules according to which they are construed and receive effect.

¹ *Sarsfield v. Witherly*, Carthew, 82.

² *Milne v. Graham*, 1 Barnew and Cressw. 192, 2. Dowl. and Ryl. 293, confirmed by *Bentley v. Northhouse*, 1. M. and Malk. 66, which related to a bill made in Scotland, and also *Pollard v. Herries*, 3 B. and Pull. 335. A contrary opinion had been previously expressed in *Carr v. Shaw*, Bayley, 26. The point was afterwards stated as still open by Tenterden, C. J. in *De la Chaumette v. The Bank of England*, 9 B. and Cr. 206, which, however, was sent to a new trial, on another ground. But it has been since decided, on full argument, that the 3 and 4 Anne, c. 9, protects the negociability of English bank notes in France, in another case, *De la Chaumette v. The Bank of England*, 2 B. and Ad. 208.

III. Their completion by delivery,—its consequences, and the obligations arising from it.

IV. The effect of alterations made on bills or notes before or after delivery, with reference to their obligatory force, whether at common law, or under the stamp acts.

Having thus discussed the general requisites and qualities of bills and notes, we shall examine shortly,

V. The leading peculiarities of those documents which fall under the several descriptions of bank notes, bankers' notes, and drafts or checks on bankers.

SECTION I.

Qualities and Requisites connected with the general Nature and Purposes of Bills and Notes.

1. No particular form of words is necessary to constitute a bill or note; it is enough if its purport be clearly expressed.

It is said, that, in one case¹, even an indorsement on a bond was held to be a good bill for its contents; the bond itself, to which the indorsement referred, supplying what was necessary to complete its meaning.

In England, it has been held that an order “to deliver” a certain sum would constitute a good bill², and that a written promise to be “accountable” or “responsible” for a certain sum to a party or his order, or a promise that he or his order should receive³ “a hundred pounds,” would be a good promissory-note. But it has been decided⁴, that a mere acknowledgment of debt, without a promise to pay, is not a bill or note; and that an acknowledgment⁵, that a party had left “in my hands £.200,” was not a bill or note, and farther, was not liable to a receipt stamp. An acceptance of a document addressed to the acceptor, but bearing “I promise to pay,” &c.⁶ has been held to be a promissory-note; or an acknowledgment to have received a sum, “which I promise to pay on demand, “with interest⁷,” and it has been decided, that a party who

¹ *Alison v. Crawford*, cited in *Thoirs v. Fraser*, *Morr.* 1470.

² *Per C. J.* in *Morris v. Lee*, 2 *Lord Raym. Rep.* 1397.

³ *Per C. J.* in *Morris v. Lee*, *Note* 2.

⁴ *Per Reynolds J.* (S. C.) 8 *Modern Rep.* 364.

⁵ *Per Fortescue J.* (S. C.) 8 *Modern Rep.* 364. *Vide* farther on this subject, *Chadwick v. Allen*, 2 *Str.* 706; (*Ruff v. Webb*, 1 *Esp. C. N. P.* 426; contra *Little v. Slackford*, *M. and Malk.* 171); *Cashbourn v. Dutton*, *Selwyn's N. P.* 378, 5th edit.; *Popplewell v. Wilson*, 1 *Str.* 263.

⁶ *Fisher v. Leslie*, 1 *Espinasse*, 426; *Israel v. Israel*, 1 *Camp.* 499.

⁷ *Tomkins v. Ashby*, 6 *B. and Cr.* 541.

⁸ *Black v. Bell*, 2 *M. and Malk.* 149.

⁹ *Ashby*, 3 *M. and Pay.* 186. A decision somewhat inconsistent with those now cited, is said to have been pronounced in *Guy v. Harris*, *Bayley* 6, *Chitty*, 8th edition, 558; but it would not probably be now followed.

signed and indorsed a document, bearing, "I promise to pay," &c. was liable as on a promissory-note, although another party, to whom it was addressed, had also written his name across it¹. An obligation to pay £.5 for the purchase of a cart has been held not to be a note, but an agreement, and has been sustained when written on a 6d. receipt stamp². A request to pay £.7, and place it to my account, and you will oblige, &c. has been held not to be a bill, there being no demand as of right³.

It has been held in England, that a note acknowledging to have borrowed a certain sum, "which I promise *never* to pay," is a good promissory-note⁴, and that documents in the form of bills, which were addressed to the drawees thus, "*At* (instead "*of To*") Messrs John Morson and Co.⁵;" or "*At* (instead "*of To*") John Perring and Coy.'s⁶," were, notwithstanding, valid bills, and afforded good ground of action against the drawers, but were not promissory-notes⁷. In Scotland, where the use of summary diligence on bills and notes renders it necessary to construe them according to their obvious meaning, an express promise to pay is required, and, therefore, the promissory-note first mentioned would not have been sustained, though the money might have been recovered from the granter by an action on the ground of fraud. The same remedy would probably have been necessary in the two other cases, seeing the documents in question had not, what is essential to a bill, viz. a proper address to the drawees. This defect was not supplied by acceptance of the bills, which has been held to point out the drawee, independently of any address; and the drawer's obligation under the bill, depending on its validity as a bill, could not be effectual, if it was wanting in such an essential point.

Action has been sustained against the drawer of a bill, which

¹ *Edis v. Bury*, 6. B. and Cr. 433.

² *Ellis v. Ellis, Gow*, 216.

³ *Little v. Slackford*, 1 M. and Malk. 171.

Note.—As to other documents which have been held to be or not to be bills or notes, see post, on stamps of bills or notes.

⁴ *Per Lord Hardwicke*, in *Simpson v. Vaughan*, 2 Atkins, 32.

⁵ *Shuttleworth v. Stephens*, 1 Camp. 407.

⁶ *Allan v. Mawson*, 4 Camp. 115.

⁷ *Rex v. Hunter*, Bayley 7; *Russ. and Ry. C. C.* 511.

was drawn really on himself, under his own *name*, though with a different designation¹, he being liable as drawer, as if he had drawn the bill on a fictitious person. It has been said², that such an instrument is in legal operation rather a note than a bill. But, when the drawers and acceptors, though consisting of the same individuals, subscribe under different firms, the instrument must be considered as a bill, since the drawers and indorsers are, *ex facie* of it, distinct parties³. As the partners of both firms, however, are truly the same, it has been decided, that the holder, on establishing this fact, may use diligence against any individual partner, either as drawer or acceptor⁴. In an English case⁵, where a bill was drawn on the defendant by a firm of which he was a partner, and was accepted by him, it was held competent to sue him under two separate declarations, in one as drawer, and in the other as acceptor.

A bill or note must be in writing; but the writing may be in pencil⁶.

2. Bills or notes must be granted for money, and not for commodities. Thus it has been decided, that precepts for delivery of salt⁷ have not the privileges of bills, but that an indorsee in such documents is merely a common assignee⁸; and the same rule has been applied to the acceptance of a bill for delivery of grain⁹, though, in all these cases, the documents founded on, being *in re mercatoria*, were sustained as probative writs; and the decision in the case last referred to, implies, that the indorsement of such a document was effectual as an *assignation*. The same thing has been decided¹⁰, on the ground of mercantile usage, with regard to the indorse-

¹ *Starkie v. Cheesman*, Carthew's Rep. 509; *Dehery v. Herriot*, 1 Shower, 163; *Robinson v. Bland*, Burrow's Rep. 1077; *Jocelyn v. La Serre*, Fortescue, 282; *Roach v. Ostler*, 1 M. and Ryl. 120.

² Bayley, 8.

³ *Per* Lord Eldon in *ex parte* Parr, 18 Ves. 69.

⁴ *Thomson v. Liddel and Co. and others*, 2d July 1812, F. C.

⁵ *Wise v. Prowse*, 9 Price, 393.

⁶ *Geary v. Physic*, 5 B. and Cr. 234.

⁷ *Lesly v. Robertson*, 16th Dec. 1713, Morr. 1397; *Douglas v. Erskine*, 18th Feb. 1715, Morr. 1397.

⁸ *Ibid.*

⁹ *Bruce of Powfoulis v. Wark and Maxwell*, Nov. 1729, Morr. 1399.

¹⁰ *Hamilton v. Dalrymple*, 31st Jan. 1724, Morr. 1403.

ment of a fish debenture, which, indeed, was in one case¹ found preferable, though blank, to an arrestment used after its date in the hands of the Commissioners of Customs. There is reason, however, to doubt whether this decision would be now followed. In a subsequent case², where the indorsee of a fish debenture brought an action for its amount, against the original holder and indorser, the Court, holding *inter alia*, that debentures had not the privileges of bills, sustained a defence of compensation by him, in respect of a debt due to him by an intermediate holder, whose name did not appear on the debenture.

In England, the privileges of bills have been always refused to documents given for the performance of other acts than the payment of money³. In two recent cases⁴, certain promissory-notes made payable in money or Bank of England notes were found null, it being held that they should have been made payable in money alone; but a document promising to pay "pound," instead of "pounds," has been held in England to be a promissory-note⁵.

3. A bill or note must be payable absolutely and at all events. The privileges of a bill have, therefore, been refused⁶ to a document granted for payment of ten shillings *per diem* to the holder, till he should be provided with a company in the army; and also, in another case, to a bill⁷ made payable only in a particular event. But a document, which makes the payment certain, is valid as a bill, though it provides for payment out of a particular fund, as, where the drawer of a bill orders the drawee to pay a third party or order £.111 "out of the first subsistence you receive for me," but with the words added, "*which (sum) shall become due eight months after date,*" these last words being held

¹ Hope v. Neilson, 25th July 1744, Morr. p. 1403.

² Alison v. Williamson's Representatives, 7. Nov. 1749, Morr. 16981; Elchies, v. Bill, No. 46.

³ Martin v. Chauntry, 2 Strange, 1271; Buller's *Nisi Prius*, 272; Bolton v. Dugdale, 4 B. and Ad. 619.

⁴ Imeson, *ex parte*, 2 Rose's B. C. 225; Davison, *ex parte*, Buck, B. C. 31. *Vide* also, Rex v. Wilson, Bayley, 11.

⁵ Rex v. Post, Bayley, 11; Chitty, 153.

⁶ Viscount Garrook v. The Duke of Queensberry, Feb. 1721, Morr. 1401.

⁷ Campbell v. Campbell, 1793, Morr. 1410.

to make the debt absolute¹. In another case, a bill being drawn on a paymaster, payable out of his clearings for a certain period, and "in full of his and haubois's dues from said regiment, when received," and being accepted by him "when the clearance comes to my hand," the Court² preferred the payee to an arrestment in the hands of the commissioners for payment of the fund. Here, the fund being a public fund, both the certainty of its payment and its sufficiency to pay the bill seem to have been undoubted. But it is not certain that this was the ground of decision. In another case, a bill was sustained, when made payable only on the payee delivering to the acceptor the vendition of a ship, which he had been commissioned by him to purchase³, though that event appears to have been contingent. But the objection was not stated. Again, the Court sustained a bill made payable to a wife after her marriage, exclusive of the *jus mariti*, (the debt for which it was granted not falling under the *ius mariti*,) because the exclusion was intended, not to make the payment conditional, but to designate the wife as the proper payee⁴.

In England, with regard to bills, and also promissory-notes, which are on the same footing with them, these rules are established; 1st, That no document can be considered as a bill or note, in which the sum to be paid is not precisely fixed, or in which payment is made to depend on a contingency, or in which there is any uncertainty, either as to the obligant or the payee, as where a bill or note is made payable by or to A or B; which case, however, is different from that to be afterwards mentioned, of a bill or note blank in the payee's name; 2dly, That, though a bill payable only out of a particular fund cannot be sued on as a bill, the acceptance of it warrants an action against the acceptor for money had and received to the holder's use⁵; and operates an assignment of the fund in the acceptor's hands, to the ex-

¹ M'Dowal v. Duke of Douglas, June 1731, Morr. 1541.

² M'Gibbon v. The Managers of Newmill's Factory, Morr. 1400.

³ Gibson v. Leith, 2d Jan. 1711, Morr. 10087.

⁴ Mungal v. Calder, 11th Jan. 1750, Morr. 5771.

⁵ Maber v. Massias, 2 Bl. 1072.

clusion of his general creditors¹; and, 3dly, That a document is valid as a bill or note, *if the payment is certain*, although a particular fund should be pointed out as that out of which it is expected to be made, or though the payment is not to take place till the occurrence of an event not yet arrived², or though it is not to be made till notice by the payee,

¹ Kirk, *ex parte*, 1 Atk. 108.

² For an illustration of the first of these rules, consult *Carlos v. Francourt*, 5 Term Rep. 482; *Roberts v. Peake*, 1 Burr. 323; *Dawkes v. Lord Deloraine*, 3 Wilson, 207; *Hill v. Halford*, 2 Bos. and Pull. 413; *Blackenhagen v. Blundell*, 2 Barnew and Alders, 417; *Kingston v. Long*, Bayley, 16; *Smith v. Boheme*, 3 Lord Raym. 67; *Beardesley v. Baldwin*, Str. 1151; *Braham v. Bubb*, Chitty, 155; *Appleby v. Biddulph*, cited 8 Mod. Rep. 363; *Joceylin v. La Serre*, 10 Mod. R. 294, 316; *ex parte Tootel*, 4 Ves. jun. 372; *Jenny v. Herle*, Lord Raym. 1361; *Pearson v. Garret*, Cumberb. 227, 4 Mod. 242; *Haydock v. Linch*, Raym. 1563; *Banbury v. Liset*, 2 Str. 1211; *Ralli v. Sarrell*, 1 Dowl. and Ry. Cas. N. P. 33; *Palmer v. Pratt* and others, 9 Moore, 358; *Clarke v. Perceval*, 2 B. and Ad. 560; *Morgan v. Jones*, 1 C. and J. 162, 1 Tyrrwh. 29. Acceptances in some of these cases, as in *Jenny v. Herle*, and *Banbury v. Liset*, were conditional of the acceptor ever obtaining possession of a certain fund. An ordinary acceptance, on the contrary, is held to admit the actual possession of a fund, because it obliges the drawee to pay at all events. The same rule is farther illustrated by the cases of *Leeds v. Lancashire*, 2 Camp. 205; *Hartley v. Wilkinson*, 4 Camp. 127, and 4 Maule and Sel. 25; *Williamson v. Bennet*, 2 Camp. 416; *Smith v. Nightingale*, 2 Starkie, 375; *per the Lord Chancellor* in *Yates v. Grove*, 1 Ves. 281; *Lewis v. Ord*, stated in Selw. N. P. 382, note 71, 5th edit.; *Bolton v. Dugdale*, 1 Nev. and Man. 412. and 4. B. and Ad. 619. For cases as to the uncertainty of the obligant or payee, *vide Rex v. Richards*, 1 Russ. and Ry. C. C. 193; *Rex v. Randall*, *ibid.* 195; *Ferris v. Bond*, 4 B. and A. 679, Bayley, 17, N. 22; *Blackenhagen v. Blundell*, 2 B. and A. 417. The cases in support of the *second* rule have been already noticed. In illustration of the *third* rule, reference may be made to *Macleod v. Snee*, Lord Raym. 1481; Str. 762; 1 Barnard, 12; *Pierson v. Dunlop*, 2 Cowp. 571; *Burchell v. Sclocock*, Lord Raym. 1545; *Hausonillier v. Hartinsk*, 7 T. R. 733; consult also *Butler v. Cripps*, 6 Mod. 29, Mod. and Ent. 312, Anon. Tel. Case, 29. In all these cases a particular fund is referred to, though the payment is declared to be independent of it. *Vide* also *Andrews v. Franklin*, 1 Str. 23; *Cook v. Colehan*, Willes, 393; *Goss v. Nelson*, 1 Burr. 227, in which cases the payment is delayed till the occurrence of a future though certain event. In *Evans v. Underwood*, as stated in 1 Wils. 262, the reporter says *he heard* that the Court gave effect to a note which was made payable on the payee receiving his wages from his Majesty's ship *Suffolk*. But the Court are said, (Selwyn, 382, note 71,) to have afterwards doubted whether this was so decided; and though they intimated that the decision, if given, must have proceeded on the ground of the paying off of the ship being a certain event, yet Bayley, (24, note 51,) reasonably questions the soundness of such a decision, as it was uncertain whether the payee might ever receive his wages.

provided there is an unconditional acknowledgment of debt¹. These rules appear in the abstract to be consistent with those of our law. But it must be afterwards considered to *what extent* it is compatible with the nature of a bill or note, as a mercantile document, to delay the payment of it till the occurrence of a future though certain event.

Bills or notes which are void on any of the grounds now mentioned, cannot be effectual grounds of claim in the hands of an indorsee, or against a bankrupt estate².

It has been even made a subject of discussion in England, whether conditions of payment, when contained in a separate memorandum on the bill or note, may not control its effect, so as to render it inoperative. These points appear to be settled by the English Courts; *1st*, That the terms of a bill or note cannot be qualified by *parole* evidence of any separate agreement made at the same time³, though effect will be given to such an agreement made afterwards⁴; *2dly*, That a memorandum, written either on the bill or note, or on a separate paper, with the consent of parties, before they subscribe, may limit or do away its effect, at least in a question between the original parties⁵, but will not probably have this effect against a *bona fide* onerous indorsee⁶; *3dly*, That a memorandum

¹ Clayton v. Gosling, 5 B. and Cr.; 8 Dowl. and Ryl. 362, 110; also Richards, 2 B. and Ad. 247.

² Consult cases noticed in Chitty, 164, note *h*.

³ Hoare v. Graham, 3 Campb. 57; Rawson v. Walker, 1 Starkie, 361; Woodbridge v. Spooner, 3 B. and A. 233; Free v. Hawkins, 8 Taunt. 92; Dukes v. Dow, Chitty, 162, note *c*; Campbell v. Hodgson, Gow, 74; Ridout v. Bristow, 1 Cr. and Jerv. 231, Tyrwh. 84; Moseley v. Hanford, 10 B. and Cr. 729; *vide* Usborn v. Larkin, Chitty, 163, note *c*, with explanation of it by him.

⁴ *Vide* observations in Hoare v. Graham, 3 Campb. 57; and Pike v. Sweet, Dans. and Lloy. 159.

⁵ Bowerbank v. Montiero, 4 Taunt. 844; Steel v. Bradfield, *ibid.* 277; and Gibbon v. Scott, 2 Starkie, 286; where the separate agreement appeared to be recognised, though it was held that the defendants had not availed themselves of it; *vide* also Beete v. Bidgood, 1 M. and Ryl. 143; 7 B. and Cr. 453.

⁶ In Bowerbank v. Montiero, Gibbs J. rested his opinion in support of the memorandum partly on the ground that there was no innocent indorsee. In Leeds v. Lancashire, *ante*, p. 11, note¹, where it was maintained, that the note sued on had been rendered conditional by a memorandum on the back of it, written before signature, Lord Ellenborough held, that this *might possibly have been a note notwithstanding in the hands of an onerous indorsee*, though the memo-

has no such effect unless it is proved to have been written before the subscription of the bill or note¹; 4^{thly}, That a memorandum annexed to a promissory-note, specifying a particular place of payment, is not in any case to be held as part of the note², or as limiting its operation. Such a memorandum annexed to the address or acceptance of a bill has been held to be in a different situation, for reasons to be afterwards explained. The first, third and last of these rules probably would be adopted in Scotland. But it is doubtful whether the second rule would be admitted, even with reference to an unsigned memorandum on a bill or note, though on that subject I do not express a decided opinion. A memorandum on a separate paper could have no effect, even between the parties to a bill or note, unless it were separately subscribed by the parties. If it were, in such a case, considered as a writing *in re mercatoria*, subscription would be sufficient; otherwise, additional formalities, peculiar to the law of Scotland, would be required. No such writing could be effectual against a *bona fide* onerous indorsee of the bill or note.

4. It is no objection to a bill or note that it contains statements or explanations which are extraneous to its proper nature, provided these do not limit or qualify the obligation contained in it; as, for instance, a bill drawn for payment of £.100, as the price of a crop of corn and grass, "which are

random had the effect of voiding it as between the original parties. In the subsequent case, indeed, of *Hartly v. Wilkinson*, *ibid.*, his Lordship sustained a similar memorandum, to the effect of voiding the note even against an indorsee. But the tendency of the preceding cases appears to be rather against this judgment.

¹ In *Stone v. Metcalf*, 4 Camp. 217, an alleged limitation of a note in a memorandum was rejected, partly on the ground stated in the text, and partly because it was held to form in itself no proper limitation.

² *Exon v. Russell*, 4 M. and S. 505; *Price v. Mitchell*, 4 Camp. 230; *Sanderson v. Judge*, 2 H. Bl. 509; *Wild v. Rennard*, 1 Camp. 425; *Richards v. Lord Milsington*, Holt, C. N. P. 364. In another case, *Spitsbergen v. Kohn*, 1 Starkie, 125, being an action by an indorsee against the grantor of a note made in Prussia, payable at seven days' sight, but to which these words were added, before it was issued, "*accepted by myself*, payable everywhere;" Lord Ellenborough held, that these words formed no part of the original instrument, but merely acknowledged the sight of the note; and that, though contemporaneous with it, their effect in law was subsequent, viz. in regulating the term of payment.

“instantly sold you at the foresaid price¹,” or a bill in these words: “Pay to me, or order, the sum of _____, and this, “with my receipt, shall be a sufficient discharge of all I can “ask or claim of you preceding this date²,” it being held that the insertion of this discharge did not affect the proper obligation in the bill. When one party accepts a bill as principal, and another as cautioner, the obligation of the principal is valid. Such bills were once held null as to the cautioner³; but it appears to be now settled, that even the party subscribing “as cautioner” is liable to the holder as principal.

5. A bill or note is not invalid, though it should stipulate interest from its date, or from the date of payment. Such a stipulation, to take effect from the date of payment, cannot be held to annul it; for interest was declared to be due from that date upon accepted bills, by the act 1681, c. 20; the terms of which, on this subject, seem almost sufficient to include all bills, but which, at any rate, was extended in this, as well as in all other points, to inland bills, by the act 1696, c. 36⁴. Promissory-notes were placed, in this as in other respects, on the same footing with bills, by the 12 Geo. III, c. 72, § 36. In England, the same rule exists⁵ at common law⁶. The stipulation, therefore, of interest, either on bills or notes, from the date of payment, merely expresses what the law provides, and hence it cannot be a ground of nullity. Accordingly, the objections stated appear to have been confined chiefly to those bills or notes which stipulate interest from their dates. But such a stipulation does not seem to form a good objection. Its existence affords a presumption, that the debt has been incurred at *the date* of the bill or note, though the payment of it may have been delayed; and, therefore, the creditor has a right to stipu-

¹ *Wilson v. Smith*, 6th Dec. 1722, *Morr.* 1402.

² *Trotter v. Shiel*, 21st Feb. 1738, *Morr.* 1402. A bill of the same kind was sustained without any objection on that ground, in *Erskine v. Thomson*, 12th Dec. 1711, *Morr.* 1501.

³ *Vide* on this subject, *Gibson v. Campbell*, 27th Nov. 1753, *Morr.* 1406; *A' v. B.*, 15th Jan. 1736, *Cl. Hom.*; same case, *Elchies, v. Bill*; *Alexander v. Scott*, 18th June 1742, *Elchies*, *ibid.*

⁴ *Vide* *Blair v. Oliphant*, 8th June 1708, *Morr.* 473, in which this was decided to be the effect of the act 1696.

⁵ *Laing v. Stone*, 2 M. and Ryl. 561.

late interest from that date. It was once objected to such a stipulation, that it was inconsistent with mercantile practice; but this was at last found not to be the case. Finally, It was objected that this stipulation tended to convert bills or notes, (contrary to their proper nature,) into permanent securities for money. But this objection applied equally to stipulations of interest from the term of payment, though they formed no ground of nullity, because such interest is due *ex lege*. This, however, was the strongest objection against bills or notes stipulating interest from their dates, at a time when, from there being no short prescription of these documents, it was possible that they might be kept up for an indefinite time. But that risk was removed by the sexennial prescription; more especially as that prescription is now held¹ not to be counteracted by any payment of interest made *within* the years of prescription². Accordingly, the last case of a stipulation of interest from the date of the bill, in which the Court gave full effect to the bill³, occurred after the sexennial prescription was established. In that case, which related to the

¹ *Ferguson v. Bethune*, 7th March 1811, F. C.

² In the former edition of this work, a sketch was given of the remarkable fluctuation of judgments which took place, for many years, on this subject. That sketch has been now suppressed as unnecessary. But those who feel inclined to trace the history of the law on this subject may consult the following cases, which are in favour of bills bearing interest from their dates, viz. *Haliburton v. Ker and Lord March*, 16th Feb. 1725, 5 Brown's Supp. 156; *Henderson v. Sinclair*, Dec. 1727, Morr. 1418; *Brown v. Irvine*, Feb. 1733, 2 Fol. Dict. 554; *Dinwoodie v. Johnstone*, 28th June 1737, Morr. 1419; *Elchies*, No. 16, v. Bill; *Gilhagie v. Orr*, 13th Dec. 1728, Morr. 1421-2; *Dun v. Adam*, 5th Feb. 1735, *Elchies*, No. 5, v. Bill; *Schaw v. Russell*, 9th June 1743, Morr. 1423; *Elchies*, No. 30, v. Bill; *Lauder v. Murray*, 10th June 1744, Morr. 1424, mentioned in *Elchies*, No. 30, v. Bill; *Gordon v. Gordon*, 2d Nov. 1750, Morr. 1426; *M'Lauchlan v. M'Lauchlan*, 2d Jan. 1760, Morr. 1433; and the following cases, which are unfavourable to such bills, viz. *Innes v. Flockhart*, 1727, Morr. 1419; *Thoirs v. Fraser*, 3d Dec. 1730, Morr. 1469; *Chatto v. Davidson*, Feb. 1730, Morr. 17031; *Macneil v. Campbell*, 24th June 1741, Morr. 1422; *Paterson v. Finlays*, 25th Feb. 1741, Morr. 1422; *Elchies*, Nos. 22. and 23, v. Bill; *Drummond v. Graham*, 9th Dec. 1743, Morr. 1424; *Gordon v. Lady Kinminity*, 9th Dec. 1747, Morr. 10194; *Elchies*, v. Bill, No. 48; *Lockhart v. Merrie*, 11th Dec. 1750, Morr. 1427-8; *Elchies*, v. Bill, No. 48; *Moncreiff v. Moncreiff*, 30th July 1751; *Ibid.* No. 51; *Dalrymple v. Lyon*, 24th June 1757, *Ibid.* No. 53; *Douglas and Lindsay v. Brown*, 16th Dec. 1757, Morr. 1429-32.

³ *Sword v. Blair*, 23d June 1790, Morr. 1433.

validity of a bill stipulating interest from its date, and holograph of the acceptor, the Court, proceeding chiefly, as is now ascertained ¹, on "the general understanding and practice of merchants, regarding stipulations of interest in bills, "e.g. bankers' notes and East India bills," held, that the former decisions, annulling "bills bearing a clause of interest, "were erroneous," and passed a bill of advocacy against a judgment of the Commissaries which had refused action on the bill. This decision, therefore, may perhaps be considered as settling the validity of bills stipulating interest from their dates. In England, though much older than Scotland as a commercial country, their validity has been uniformly admitted ².

6. It has been decided in several cases ³, that a bill which stipulates a penalty is null, the stipulation being inconsistent with the nature of bills. But it would perhaps be now held, that a bill or note containing such a clause is good, and that the clause is to be considered *pro non scripto*, agreeably to the principle already laid down, that a bill is not vitiated by the insertion of an extraneous clause, which does not affect the essence of the obligation. Indeed, it has been decided, that a bill is valid, though it stipulates for "penalty conform to law ⁴," it being held that such a clause is superfluous, because by law no penalty is due. But the same principle seems to be applicable, although the words "conform to law" should be omitted; since it may be fairly presumed, that a party who stipulates for penalty in a bill believes that it is "conformable to law."

7. It affords no objection to the granter of a bill against payment, that it was deposited by him with an arbiter, as a security for performance of the decree-arbitral, and was given up by the arbiter to the successful party. This was decided ⁵ in a case, where it appeared, that two parties in a submission

¹ *Vide Note of Errata to the Fac. Rep. Morr. 1435.*

² *Kennerley v. Nash*, 1 Starkie, 452-3; *Cameron v. Smith*, 2 B. and A. 305; *Doman v. Dibdin*, 1 Ryan and Moodie, 382.

³ *Innes v. Flockhart*, 1727, Morr. 1418-19, and 1469-17; *Drummond v. Graham*, Morr. 1424; *Thoirs v. Fraser*, Morr. 1472.

⁴ *M'Neil v. Campbell*, 24th Jan. 1741, Morr. 1422; *M'Lauchlan v. Mac-Lauchlan*, 2d Jan. 1760, Morr. 1432.

⁵ *Clark v. Ker*, Morr. 1405; *Elchies v. Bill*, No. 59.

had each lodged with the arbiters his acceptance for £.20 ; and that the arbiters having found one of them liable for £.13, had given up his bill to the other party, after causing that party mark on it a partial payment of £.7. The Court sustained action on it for the balance. The argument of the successful party was, that a verbal submission could have been effectuated by placing money at the disposal of the arbiters, and that bills are to be considered as money. A person who is thus entrusted with a bill has an absolute control over it, and therefore the right of any third party who receives it from him is complete. In the present case, the arbiters disposed of the bill agreeably to the understanding on which they received it. But, though they had done otherwise, a third party receiving the bill, without being privy to that understanding, could not have been affected by it, or by any thing which did not appear on the face of the bill.

8. Bills and notes are limited, in some measure, from their nature as commercial documents. As they were at first devised for the adjustment of real debts in the ordinary course of business, courts of law have repeatedly interposed to prevent them from being misapplied to different purposes. Foreign bills, which were first introduced, have been all along employed chiefly for the quick adjustment of mercantile transactions between different countries. But, after merchants had recourse to inland bills, which were often made payable, not to a third party, but to the drawer himself, and still more, when promissory-notes were introduced, these obligations, being primarily constituted betwixt two parties only, viz. the obligant and the obligee, were naturally extended to all obligations for payment of money, whether connected with commerce or not. These documents, too, however, acquired at last the privileges of foreign bills, and, in particular, were made indorsable like them, so that they also became, in a great measure, commercial documents. Hence, it was considered dangerous to allow even them to be granted for transactions out of the ordinary course of business, seeing they enjoyed that exemption from strict form, and that facility of transmission which were allowed chiefly, if not solely, from indulgence to commerce. This was more strongly felt in the case of inland bills, so long as there was no fixed limit to their en-

duration except the long prescription ; and, during that period, the Court made many attempts, on the one hand, to restrict their operation to proper mercantile transactions, and, on the other, to fix some period at which their peculiar privileges, and even their efficacy as documents of debt, should cease. But this danger became less imminent after the sexennial prescription was introduced ; and, therefore, there has not been, since that time, the same inclination that there was before, to abridge either the extent or duration of the extraordinary privileges of bills and notes. The combined result of all these circumstances has been, that, on the one hand, the simple form of bills payable to the drawer, and of promissory-notes, has rendered them applicable to many obligations, which the form and primary object of foreign bills of exchange would have excluded, (this enlargement of their operation being now also rendered safer by the sexennial prescription) ; and, on the other hand, that such notes or inland bills, having acquired all the privileges of other bills, are restricted on that account more closely than they would otherwise have been, to the proper purposes of mercantile documents.

Still it is not easy to fix a precise limit for their operation. But the primary purpose of bills or notes being the adjustment of debts in the ordinary course of business, there are certain objects inconsistent with this, to which the Court has, therefore, found that they are inapplicable. Thus, it has been decided, that a bill is not effectual to constitute a legacy, or donation *mortis causa*¹. The Court has farther decided, that a bill bearing "value received," and accepted payable to the drawer at the first term after the death of the acceptor, who was the drawer's brother, could not produce action at the in-

¹ *Fulton and Clark v. Blair*, 9th Nov. 1722, *Morr.* 1411 ; *Huttons v. Hutton*, 13th Feb. 1724, *Morr.* 1412-3 ; *Myrton v. Livingston*, cited in the case of *Huttons* ; *Wright v. Wrights*, 11th Feb. 1761, *Morr.* 8067 ; *Dowie v. Millie*, 2d Feb. 1786, *Morr.* 8107. These were all cases of bills, and the question occurred in all of them with the original payee. Lord Kilkerran says, in a note to the case of *Weir v. Parkhill*, to be immediately noticed, that the Court held a bill granted by way of donation *mortis causa*, to be void. But this point does not appear to have properly occurred in that case, as the question in it was with the original payee ; and it has been held in other cases, to be afterwards mentioned, that such a bill is good in the hands of an onerous indorsee.

² *Macarthur Stewart v. Fullarton and others*, 29th Jan. 1782, *Morr.* 1408.

stance of the drawer's executor, the acceptor having lived thirty-seven years after the date of the bill. It does not appear that the presumption of onerosity, arising from the words "value received",¹ had been redargued, and the Court is said not to have considered the bill as a legacy. But they held, that the right which it contained was of so anomalous a kind, as not to be the proper subject of a bill. It is probable that they were influenced partly by the lapse of time, and partly by the idea of its conferring what was truly a right of succession, though given in the form of a *jus crediti*; and it may therefore be held, on the authority of this decision, that such a right, though provided to take place absolutely on the grantor's death, is not consistent with the nature of a bill.

The same principle appears to have regulated an earlier case², where a bill being drawn and accepted payable to the drawer or order, "or failing me, by decease, to my second son Alexander Waddel," and being indorsed by the drawer to Alexander Waddel, and by him assigned to the pursuer, the Court sustained the objection to the bill, that it contained a substitution of heirs. They appear, however, to have admitted the bill as a document of debt, in consequence of a proof that the amount of it had actually been paid to the acceptor. It may be doubted, whether it was proper thus to receive it as a document of debt, seeing it was not a document *in re mercatoria*, or a regular written obligation; and it can scarcely be held, that its defects in this particular were supplied by parole proof. The bill was probably invalid also on another ground, which seems applicable to the payee, as well as to the obligation contained in the bill, viz. that both the one and the other shall be certain, and not conditional or alternative. This rule has been applied in England, in various cases already referred to, where the obligation in a promissory-note was granted alternatively to one of two individuals³.

It has been recently held in England⁴, that the delivery by

¹ Post, on the effect of the words, "value received."

² *Inglis v. Wiseman's Representatives*, 27th July 1730, Morr. 1404.

³ *Ferris v. Bond, Bayley*, p. 17; 4 B. and A. 479; and *Appleby v. Bidulph*, cited 8 Mod. Rep. 363; *Blackenhagen v. Blundell*, 2 B. and A. 417.

⁴ *Ranken v. Weguelin, Chitty*, 791.

a husband to a wife on deathbed, for her use, of bills payable to his order, but without indorsing them, was effectual, although an alleged donation of a promissory-note to a female servant was negatived by the verdict of a jury, and the Court held that there must be strong evidence in such a case to rebut the suspicion of fraud, where the party had access to keys and drawers¹.

It has been also decided, that a bill granted by way of a donation *inter vivos* cannot be effectual to the grantee². In one case, where a man gave a servant a bill for £.100, as a guarantee for a promise to marry her, the Court³ found her entitled to enforce it; and their judgment was affirmed on appeal. But the judgment probably went on this ground, (which was argued *inter alia*,) that the consideration of the bill, viz. the accepted promise of marriage, though not accounted then, as it has been since, to form an obligation in law, formed, at least, a moral obligation, and that therefore the bill was to be held as given onerously. It has been farther decided, that although a bill cannot be *granted* with the view of constituting a donation, it may be *indorsed* with that view. This was the decision⁴ in a case where a husband's executors having sued his wife, (who had a general intromission with his effects after his death,) for two bills blank indorsed, and she having proved in defence, that her husband gave them to her after he was ill, but before he was bed-ridden, desiring her to keep them for her own use, the Court, (moved, perhaps, as the report bears, by this evidence,) found that the bills were properly conveyed, and assailed her. In another case⁵, where a person had indorsed a bill for 1000 merks to his grandson by a daughter, then under age, and put it, thus indorsed, but without particular instructions, into the hands of his only son and general disponent, the Court, in an action for delivery brought

¹ Simms v. Cox, Chitty, 791.

² Weir v. Parkhill, 26th Nov. 1736, and 7th Jan. 1737, Morr. 1413; Elchies, v. Bill. No. 10; and Gibson, 3d August 1776, 5 Brown's Supp. 392. Vide also the English cases of Nash v. Brown, Chitty, 85, note c.; Holliday v. Atkinson, 5 B. and C. 501, and other cases referred to by Chitty, 85.

³ Provan v. Calder and Anderson, 23d Jan. 1742, Morr. 9511; Elchies, v. Bill, No. 25.

⁴ Barbour v. Blackwood and Hair, 8th Feb. 1753, Morr. 6097.

⁵ Carrick v. Key, 6th Feb. 1787, Morr. 17009.

by the grandson, held that his right to the bill was complete, and therefore decerned in his favour. It has been also decided that a draft on a banker is effectual, though it be gratuitous. This was the ground of judgment in a case¹ which depended on the validity, *1st*, of a promissory-note payable at the following Whitsunday, which had been granted to the defender "as a consideration for his services and trouble;" and, *2dly*, of a draft on a bank, given by the maker of the note in payment of it, (on 7th June,) but not presented till (24th June) after his death. The Court, in this case, held, that such a bill or note might be validly granted for services, if they were actually performed. But the judgment proceeded specially on the ground, that the draft might be given gratuitously, in the same manner as a bill might be gratuitously *indorsed*, though it could not be *granted* without value.

In a case where a person had, with the avowed purpose of granting donations *mortis causa* to his widow and children, accepted bills drawn by the wife's brothers, who, in return, granted equivalent bills to the donees, the Court sustained action by the drawers of the original bills against the acceptor's representative², holding that they at least had given value for these bills, by the equivalent bills which they accepted in favour of the wife and children. The Court appear likewise to have held generally in this case, that such documents ought now to be more liberally construed, since the sexennial prescription, by shortening their duration, had lessened the facility of committing fraud by means of them.

Though a bill or note should be granted as a donation *mortis causa*, that will not affect its validity when in the hands of an onerous indorsee. The acceptor of a bill or granter of a note gives them currency as commercial documents, for which he or his representatives must be liable, without being allowed to plead any latent objection against an onerous indorsee, who has taken the bill or note on the faith of his subscription. It is on this principle that the onerous indorsee of an accommodation-bill has a direct claim against the acceptor, though the latter should be truly creditor in a question with the drawer of the bill. On the same principle, it has been held in

¹ Steel's Dispones v. Wemyss, 18th Dec. 1793, Morr. 1409.

² Adam v. Johnston, 2d Dec. 1782, Morr. 1416.

England¹, that a person who has accepted a bill in which the drawer's subscription is forged, cannot plead the forgery against an onerous indorsee. There is an exception to this rule in the case of bills and notes granted for gaming debts; but this exception is founded on special statutes. The point now mentioned appears to have been settled in favour of the indorsee to a bill granted originally *mortis causa*, in a case², where, although a proof was at first allowed before answer, of the facts inferring *donatio mortis causa*, as well as of an allegation that the bill had not been signed by the drawer till after the acceptor's death, yet, in a reduction of the bill afterwards brought, (for although the cases are separately reported, they appear to be the same,) the Court held "the objections proposed not competent against an onerous indorsee³."

It is a question, How far the objection of a bill or note being granted by way of donation *mortis causa* or *inter vivos*, can be proved by parole evidence? It will appear afterwards, that every bill or note presumes value received from the payee or holder, and that, in general, such a presumption cannot be redargued unless by his writ or oath. In the cases of donation already noticed, the objection arose *ex facie* of the bill or note, or was admitted by the parties. In one case, indeed⁴, a parole proof was allowed; but it related to facts tending to establish that the original claimant on the bill had not obtained legal delivery, which, as will afterwards appear, is generally essential to give a perfect right. But a bill or note granted in order to constitute a legacy, or even a donation *inter vivos*, (should that be now a good ground of objection,) would probably not be held entitled to the privileges of a bill or note, and, in particular, to the presumption of value, in respect it is not truly such a document, so that the presumption of value could not be pleaded on it, against

¹ *Bass v. Clive*, 4 M. and S. 15, *per* Dampier, J.

² *Farquhar v. Shaw*, 16th Dec. 1757, Morr. 12341, and *Shaw v. Farquhar*, 24th Nov. 1761, Morr. 1444.

³ In the former edition, some hints were thrown out, as to the probability of bills or notes granted by way of donation *inter vivos* being now sustained as effectual. But these have been omitted, as being of too speculative a nature for a practical work.

⁴ *Shaw v. Farquhar*, *ante*, p. 22.

the admission of parole evidence, more than if such evidence were offered to nullify a bill on the ground of smuggling or usury.

9. Another question is, How far a bill or note can be sustained, in which payment is stipulated to take place on an event, which, though certain in itself, is uncertain as to the time of its occurrence. The English Courts, in some of the cases already cited, have allowed great latitude in this respect. Thus, a promissory-note has been sustained, though made payable to an infant on 12th June 1750, "when he shall come of age," (the term of payment being held to be certain, whether he lived to majority or not)¹, or when made payable six weeks after the death of the granter's father², or two months after a certain ship should be paid off³. It has been suggested by one author⁴, that these being all cases of promissory-notes, were decided on a liberal construction of the English statute⁵, which renders notes negotiable, and that such a latitude is incompatible with the nature and original intention of bills of exchange. It would appear, however, from the statute to which he refers, that promissory-notes are placed by it on the same footing with bills; and, accordingly, the latest English authorities⁶ quote the foregoing cases as equally applicable in principle to both. At the same time, it is probable that such a latitude, being most compatible with promissory-notes, was, for that reason, first introduced and recognised in them. In Scotland, promissory-notes are also on the same footing with bills; and, therefore,

¹ Goss v. Nelson, 1 Burr. 226.

² Colehan v. Cooke, Willes, 393.

³ Andrews v. Franklin, 1 Str. 24.

⁴ Kyd on Bills, 3d edit. p. 58.

⁵ 3 and 4 Anne, c. 9.

⁶ Byles, 24; Chitty, 156 and 65, and the cases there cited by him, which have been already quoted. In one of the cases to which he refers, Colehan v. Cooke, the Court expressly held, that as the arrival of the term of payment was certain, it would have been sustained even in the case of a bill. In Carlos v. Francourt, 5 T. R. 482, and Williamson v. Bennett, 2 Camp. 416, instruments were found ineffectual even as promissory-notes, in respect that the term of payment was contingent, thus proving that the same rules were applied to them on this subject as to bills. In two other cases which he cites, Burchell v. Sclocock, Lord Raym. 1545, and Hausouillier v. Hartinsk, 7 T. R. 733, effect was given to promissory-notes, though they stated the particular value for which they were granted; but the only ground of sustaining them was, that the payment was stipulated to take place *at all events*. Vide also on this subject note to 2 Camp. Rep. p. 207.

whatever rules are enforced with regard to the one must be applicable to the other. The latitude which naturally arose at first from the simple form of promissory-notes may thus have been extended to bills in a degree with which their own form and primary objects were reckoned incompatible; and the sexennial limitation of both in Scotland has probably diminished the danger arising from such a latitude. But, on the other hand, the admission of summary diligence on all bills and notes renders it more necessary here than in England to limit them strictly to their proper form and objects. This reason is peculiarly applicable in fixing the term of payment; since it appears contrary to the nature of summary diligence to allow it upon a document which does not become payable till a remote or indefinite term. The sexennial prescription, too, appears to indicate that the Legislature considered bills or notes as temporary documents, and did not contemplate the possibility of extending them by making the term of payment indefinite.

Accordingly, in a case already cited¹, a *remote* term of payment appears to have been alluded to as inconsistent with the nature of bills; and the *indefinite* nature of the term of payment in another case², probably formed, at least in part, the ground of refusing action on a bill. In an earlier case³, the Court held, that a bill made payable three years after date was not entitled to the privileges of a bill, but was merely to be considered as an ordinary document of debt, liable to any pleas of compensation competent against the original creditor. It may be doubted, however, whether the same strictness would now be observed. On the other hand, a note⁴ was held to be a good ground of summary diligence, when it promised to pay £.50, as the price of three horses and a cart, in sixteen different instalments of three guineas *per* month. Such an arrangement probably arose from the nature of the case, the party not being able to make payment otherwise. The Court, however, though they expressed the opinion now mentioned, did not decide the point, but converted the charge into a libel, and decerned against the suspender for the sum

¹ Campbell v. Campbell, 1793, Morr. 1410.

² Macarthur Stewart v. Fullarton, 29th June 1792, Morr. 1408.

³ Leslie v. Nicholson, 16th Feb. 1725, Morr. 5766.

⁴ Carron Co. v. Muirhead, 25th Feb. 1796, Morr. 1457.

in the charge as for a debt, none of them having any doubt that the sum was due. In England ¹ a note payable by instalments is admitted to be valid. In short, it is not easy to point out beforehand what peculiar term or mode of payment is to be accounted inconsistent with the nature of a bill or note; nor is it perhaps incompatible with them, in all cases, to make the term of payment depend on a certain and not very remote event. The only rule which can be stated is, that such a term or mode of payment, as has been now mentioned, shall form a ground of nullity, when it indicates the intention, or necessarily has the effect of converting the bill or note from a temporary document into a permanent security. This rule must be applied according to the circumstances of each case.

¹ *Rudder v. Price*, 1 H. Blackst. 547.

SECTION II.

*Requisites in the Form and Constitution of Bills and Notes,
and their Construction and Effect.*

1. THE first requisite is one prescribed by statute, viz. that bills and notes shall be written on paper duly stamped: Stamp duties have been imposed on bills and notes by a number of successive statutes¹. The last of these is the 55 Geo. III. c. 184, which now regulates exclusively the amount of the subsisting duties on bills and notes, (those imposed formerly having been repealed,) and likewise contains most of the rules by which they are at present levied, although it declares that the powers, regulations, penalties and forfeitures enacted by former statutes on this subject shall subsist, so far as they are applicable, in the cases not expressly provided for by it.

With regard to inland bills, drafts or orders to the bearer or to order, this act distinguishes between documents which are payable on demand, or at any period not exceeding two months after date, or sixty days after sight, and those which are payable at a period exceeding one or other of these periods, the duties imposed on the latter being higher than those exigible for the former. The liability of bills to the higher or lower of these duties is reckoned from their date, as appearing *ex facie* of the bill or note², even though it should be post-

¹ 22 Geo. III. c. 33. The 23 Geo. III. c. 49, repeals the duties prescribed by the preceding act 22 Geo. III, and grants new duties; but it retains the powers given, as well as the penalties imposed by the preceding act, in so far as not repealed. The 24 Geo. III. c. 7, was passed to explain and amend the 23 Geo. III. c. 49. The 31 Geo. III. c. 25, entirely repealed these previous acts, and recalled the powers conferred, as well as the penalties and forfeitures imposed by them, enacting at the same time new duties, and enforcing them by new regulations. The duties imposed by this act were successively increased by the 37 Geo. III. c. 90, 43 Geo. III. c. 2, 44 Geo. III. c. 98, and 48 Geo. III. c. 149. Lastly, the duties imposed by these acts were repealed, and new duties substituted by the 55 Geo. III. c. 184, which is now the regulating statute.

² *Peacock v. Mirrel*, 2 Stark, 558; *Upstone v. Marchant*, 2 B. and Cr. 10; 3 D. and Ryl. 198; *Johnston v. Garnett*, 2 Chitt. Rep. 122; *Williams v. Jarrett*, 5 B. and Ad. 32.

dated. The particulars of the duties will be found in the Appendix.

It has been held¹ that a promissory-note, payable two months after sight, is liable to the larger duty, when those two months exceed sixty days' sight, although the smaller duty would have been sufficient, if the note had been payable two months *after date*. It has been also held, with reference to an exemption in the 23 Geo. III. c. 49, § 4, in favour of bills payable on demand², whereon no days of grace are allowed, that a bill payable at sight is not to be considered as a bill payable on demand, reference being also made to a former case before Willes, C. J., in which a jury of merchants had held, that days of grace must be allowed on a bill payable at sight.

The act 55 Geo. III. imposes a penalty of £.100 on every person who affixes a date to any bill or note later than that on which it was issued, so as to make its term of payment appear to be less than two months or sixty days from its date or from sight, unless the paper on which it is written be stamped for the duty applicable to a longer term of payment than two months after date, or sixty days after sight. This act further declares, that inland bills, drafts or orders, though not payable to the bearer or to order, shall be liable to the same duties as if they were so payable, if they are delivered to the payee or some person for his behoof. It is also declared, that drafts or orders for the payment of money by a bill or note, or for the delivery of a bill or note in payment or satisfaction of money, shall be liable to the same duty with inland bills or notes, if they are made payable to the bearer or to order, or to the payee or some person for his behoof. When a bill, draft or order is made payable by instalments, the duty is declared to be exigible on the total amount of such instalments. When the total sum to be paid is indefinite, the duty is exigible as for a bill payable on demand for the sum that is expressed. Farther, all receipts for money by bankers and others, which entitle the person paying the money, or holding the receipt, to get a like sum from a third party, and likewise bills, drafts or orders, (payable to the bearer or order, or de-

¹ *Sturdy v. Henderson*, coram Abbott, C. J. at Guildhall, 1821, and on motion for a new trial, 4 Barnew and Alders. 592. *Vide* also Bayley, 98.

² *Anson v. Thomas*, B. R. 24 Geo. III. Bayley, 98.

livered to the payee or some person for his behoof,) for the payment of any sum of money out of a contingent fund, or on the occurrence of a contingent event, are declared liable to the same duties with inland bills. It is a general practice with bankers, on receiving payment of sums of money, to give the parties paying them letters of credit on their correspondents elsewhere, which letters are not written on a stamp. But the legality of this practice does not appear to have been tried¹.

It has been already shewn², that instruments such as those last mentioned are not properly bills of exchange; but the clause in question declares them liable to duties as such. Accordingly, it has been decided³, that certain orders to pay a specific sum out of a contingent fund were liable to the same duty as bills for the same sum would have been, and that, therefore, an agreement stamp was inapplicable to such orders. In the second of these cases³, it was held, besides, to be a good objection, that the stamp was not affixed till after the date of the order, which, in the case of instruments placed on the same footing with bills, is not allowed, except to the extent of affixing a proper stamp afterwards, when a stamp of sufficient amount, though not of the proper denomination, has been originally affixed. On the other hand, such orders are not liable to duty as bills of exchange, unless they do specify a certain sum to be paid; because, otherwise, there is no rule for determining what is the stamp properly applicable to them. This has been decided with reference to a clause in the former stamp act, 48 Geo. III. c. 149⁴; which is the same in substance with the last.

It has been decided that a mere request, by one party to another, on whom he has no claim, to pay a certain sum to a third party, and place it to his account, is not liable to stamp duty as a bill⁵; and the same decision has been given regarding a request to pay a certain party the balance due to him for building a chapel, for which their receipt is said to be a sufficient discharge⁶.

¹ *Vide* form of such letters in Appendix.

² *Ante*, p. 9, *et seq.*

³ *Butts v. Swan*, note 2.

⁴ *Jones v. Simson*, 3 D. and R. 545; 2 B. and Cr. 318.

⁵ *Little*, 1 M. and Malk. 171.

⁶ *Crowfoot v. Gurney*, 2 M. and Scott, 473. Reference was made, in this case, to *Jones v. Simson*, as settling the point, which was then given up.

With regard to foreign bills, (or bills drawn in, but payable out of Great Britain,) if drawn singly and not in a set, they are liable to the same duty as inland bills of the same amount and tenor. On the other hand, if such bills are drawn in sets, every bill of each set is liable in a stamp duty, as specified in the Appendix, which rises progressively with the sum contained in the bill. As to promissory-notes payable to the bearer on demand, which are made, or purport to be made out of Great Britain, or for behoof of any person residing out of it, it is enacted that, whether they are payable out of Great Britain or not, they shall not be recognised or circulated in Great Britain, unless they have paid the duty exigible on such notes when made in Great Britain, (under the exception of promissory-notes payable only in Ireland;) and a penalty of £.20 is imposed on any person who circulates or negotiates, gives or receives, pays or causes to be paid any such promissory-note, or any part thereof, without its being duly stamped as aforesaid.

It is evident, from what has been already stated ¹, that the English stamp laws were meant to apply only to foreign bills drawn in England, and not to such as were drawn abroad, or at sea ². When bills were signed and dated by the drawer in Ireland ³, but with blanks for the sums, terms of payment, and drawers' names, all of which were filled up in London, where they were also negotiated, it has been held, that, though the bills might not be completed, they must be regarded as incipient contracts at the time of drawing in Ireland, and that, therefore, an Irish stamp was sufficient. In another case ⁴, where a bill was drawn in Jamaica on a Jamaica stamp, with a blank for the payee's name, which, on the transmission of the bill to England, was filled up by a *bona fide* holder, it was held that an English stamp was un-

¹ 55 Geo. III. c. 184; Schedule, v. Foreign Bills.

² In *Ximenes v. Jacques*, 1 Esp. 311, an agreement for a wager made at sea was sustained without a stamp.

³ *Snaith v. Mingay*, 1 M. and S. 87.

⁴ *Cruchly v. Mann*, 1 Marsh, 29; 5 Taunt. 529. *Vide also Paterson v. Beecher*, 6 Moore, 319, where the same doctrine was recognised in the case of an unstamped bill, bearing to be dated at St Helena; and *Holdsworth v. Hunter*, 10 B. and Cr. 449, where it was recognised in the case of a bill drawn abroad.

necessary. On the other hand, if a bill be really drawn in England, it will not be protected from the English stamp laws, merely by giving it a foreign date¹. But, if it is alleged that the bill, though dated abroad, was drawn in England, this must be proved by the clearest evidence². In the case of a bill written, but not accepted, in England, and afterwards sent for the drawer's signature, which was admitted abroad³, Dallas, C. J. held it to be a foreign bill, and, therefore, found the acceptor liable for it, though it was unstamped, conceiving the case to be the same with the ordinary one of a bill drawn abroad. But, if proved to be an English bill, it will be null, even in the hands of a *bona fide* onerous indorsee⁴. As to bills or notes which have been undoubtedly drawn abroad, it has been held that a note made in Jamaica⁵ is void if not stamped according to the law of Jamaica; and even that an agreement made at Surinam must be stamped agreeably to the laws there⁶; it being laid down, that "a contract must be available by the law of the place "where it is entered into, or it is void all the world over." This principle would lead to the enforcement of all foreign stamp laws, with reference to contracts made in a foreign country. But the contrary has been held⁷, on the ground, that our Courts are not bound to give effect to the stamp laws of foreign states. In all the cases now alluded to but the two last, the documents had been granted in places, which, though not in England, were within the British dominions.

The following deeds are exempted from duties, viz. bills

¹ *Jordaine v. Laashbrooke*, 7 T. R. 601. The foregoing doctrine was admitted in this case, where the defendant offered to prove, that a bill dated Ham-
burgh had been really drawn in London. The only question regarded the com-
petency of proving this fact by the payee and indorser, whom the Court of K.
B., after full consideration, admitted. The same rule was implied in *Abraham*
v. Dubois, 4 Camp. 269, and *Biré v. Moreau*, 2 C. and Pay. 376. The fact of
the drawer being in London two days after the date was not held sufficient, in
the first of these cases, to prove the fact. *V. also Robertson and Co. v.*
Rutledge, 11th July 1822, 1 Shaw, 562.

² *Abraham v. Dubois*, and *Biré v. Moreau*, preceding note.

³ *Boehm v. Campbell*, Gow, N. P. C. 56.

⁴ *Manners, ex parte*, 1 Rose, B. C. 18.

⁵ *Alves v. Hodgson*, 7 T. R. 241; 2 Esp. 528.

⁶ *Clegg v. Levy*, 3 Campb. 166.

⁷ *James v. Catherwood*, 3 D. and R. 190. *Vide also Brown v. Lacey*, 1
D. and R. N. P. 41; *Wynne v. Jackson*, 2 Russ. Ch. C. 351.

drawn for the payment of less than forty shillings, bills or bank post bills issued by the Bank of England, bills, orders, remittance-bills, and remittance-certificates drawn by commissioned officers, masters and surgeons in the navy, commissioners in the navy, or certain other public officers particularly specified¹, and drafts or orders payable to the bearer² on demand, which are drawn on any banker or person acting as such, who resides or does the business of a banker within fifteen miles of the place where the draft or order is issued, (the place being always specified in the draft or order,) provided that it bears date on or before the day of issuing it, and does not require payment to be made in bills or promissory-notes³. In order to prevent the abuse of this last exemption, it is provided⁴, with regard to any bill, draft or order on a banker, or person acting as such, payable to the bearer on demand, which shall be postdated, or shall not specify truly the place of issuing it, or which shall not fall in every respect within the foregoing exemption, (unless it be stamped as a bill); 1. That the person issuing it, or causing it to be issued, or any banker paying or permitting it to be paid, (while he knows of these its defects⁵), shall forfeit £.100 for each offence, and that the banker shall not be allowed credit for the payment against the drawer or his representatives⁶: 2. That any person knowingly receiving such a bill, draft or order in payment or security, shall for every offence forfeit £.20. It has been held, under a clause of exemption in the 31 Geo. III. c. 90, similarly

¹ 55 Geo. III. c. 184, Schedule, Part I.; Exemptions, v. Bill, § 2, 3 and 5.

² But it has been held, by the twelve Judges, in the King v. Yates, 1 R. and M. Cr. Cas. 170, that a draft on a banker of L.2, payable to D. Francis Jones, and not to order or to bearer, did not come under the statutory exemption, but was null, and could not form the ground of indictment under 7 and 8 Geo. IV. c. 27, § 5, as a "valuable security."

³ 9 Geo. IV. c. 49, § 15, and 55 Geo. III. c. 184, as in last note.

⁴ 55 Geo. III. c. 184, § 13.

⁵ But not if a draft be made at a place more than ten (or now fifteen miles) from the bank, but is not presumable or proved to be known to the bankers to be so; Ayton and Patten v. Dougall and others, 15th Dec. 1830, 9 S. & D. 194. In an English case, *Walters v. Brogden*, 1 Y. and Jerv. 457, where a check was cashed more than ten miles from the maker's residence, (though this was not proved to be known to the bankers who cashed it,) it was held to be void, and was not admitted even to connect the defendant's bailiff who cashed it with the defendant, so as to make the latter liable for the money received for it.

⁶ *Vide* preceding note.

worded with that now mentioned¹, that the foregoing exemption did not apply to a banker's check bearing date four days after it was drawn, though not intended to be used till the date which it bore; it being expressly required by the act, as it is likewise by the 55 Geo. III, c. 184, that the draft should be dated *on or before* the term of issuing it. In a subsequent case², the same point was admitted to be quite settled. It has been farther determined³, that the person on whom such a draft is made must be *bona fide* a banker. A person acting as a banker will be considered as such, though he has not opened a bank⁴. A check in which these requisites are not strictly observed, and which at the same time is unstamped, is not available for any purpose whatever⁵.

Promissory-notes⁶ are distinguished into four classes. The 1st class comprehends notes payable to the bearer on demand, and granted for sums not exceeding £.100, which notes are subjected to certain duties proportioned to their amount, and may be re-issued at pleasure⁷. It has been decided in England⁸, that a note payable generally to a certain person or bearer, with interest, or to the bearer with interest⁹, without specifying any term of payment, was to be considered as a note

¹ Allan v. Keeves, 1 East. 435.

² Whitwell v. Bennet, 3 Bos. and Pull. 559.

³ Castleman v. Ray, 2 Bos. and Pull. 383. This case was argued under the exemption contained in the 23 Geo. III. c. 49. But it is a precedent as the law now stands, since the words of the exemption in the 55 Geo. III. c. 184, are nearly the same. It was also held in this case, that an acknowledgment by the drawee subjoined to the draft ought not to receive effect, since that would be to validate the draft itself. In Ruff v. Webb, 1 Esp. 130, it was held by Lord Kenyon that such a draft on a person not a banker was a bill of exchange, and could not be received in evidence without being stamped.

⁴ *Ex parte* Wilson, 1 Atk. 218.

⁵ Borrodaile v. Middleton, 2 Camp. 54. In an action for usury, wherein the declaration stated that the defendants had forborne a certain sum to the plaintiffs from 21st April 1807, it being proved that, for part of this sum, the defendants had, on 21st April, given only an unstamped check, not drawn in terms of the stamp act, which had not been paid till the 22d, Lord Ellenborough, holding that such a check was waste paper, decided that it was not money paid on the 21st, as stated in the declaration, and therefore he non-suited the plaintiff. *Vide* also preceding cases, pp. 31-2.

⁶ 55 Geo. III. c. 184, *v.* Promissory-Note.

⁷ 55 Geo. III. c. 184, § 14.

⁸ Whitlock v. Underwood, 3 D. and R. 356; 2 B. and Cr. 157.

⁹ East v. ——— 2 M. and R. 8.

payable on demand, and was therefore liable to the duty imposed by the statute on notes of this kind. It was held, that the rules (to be afterwards mentioned) which are required to be observed by bankers who re-issue such notes, formed the price which they paid for the privilege of re-issuing them, but that the stamp-duty was applicable to them at all events, by the terms of the statute, whether the holders chose or not to purchase this privilege of re-issuing, which was thus considered as quite distinct from the clause imposing the duty. Class 2. includes notes granted for any sum not exceeding £.100, payable in any other way than to the bearer on demand, but at a term not longer than two months after date, or sixty days after sight, which notes are subjected to a separate scale of duties. It is now settled in England, that a note payable to A B, or order, or even to A B without the words or order, on demand, is not to be considered as payable to the bearer on demand, but falls under the class now mentioned, of notes payable otherwise than to the bearer on demand, and at a period less than two months, or sixty days after sight¹. It had been previously decided², that a note payable to A B on demand fell under class 1, as if payable to the bearer on demand; but that judgment is not now reckoned an authority³. Class 3. includes notes granted for any sum whatever, payable either to the bearer on demand, or in any other way, at a term not exceeding two months after date, or sixty days after sight, which are likewise subjected to separate duties. 4th, There are notes granted for any sum whatever, payable to the bearer or otherwise, at any time exceeding two months after date, or sixty days after sight, on which also separate duties are imposed⁴.

¹ *Armitage v. Berry*, 5 Bingh. 501; *Moyser v. Whitaker*, 9 B. and Cr. 409; *Robinson ex parte*, 1 D. and Ch. 275; *Cheetham v. Butler*, 5 B. and Ad. 837.

² *Keats v. Wheldon*, 8 B. and Cr. 7.

³ *Vide Moyser v. Whitaker*, *Robinson ex parte*, and *Cheetham v. Butler*, where, in a case quite similar, *Keates v. Wheldon* was overruled.

⁴ In a recent English case, *Barlow v. Broadhurst*, 4 Moore, 471, a note granted for payment of a specified sum to a certain person's representatives, three months after his death, under deduction of what sums might be then due by this person to the granter, was found not to be liable to stamp-duty as a promissory-note, as its amount depended on a contingency, but, being stamped with an agreement stamp, was sustained as an obligation to account.

None of these three last classes of notes can be re-issued, after being paid. Notes for the payment of money by instalments, or at different times, provided the whole sum payable is fixed, are liable to the duty applicable to a promissory-note for that sum, when payable in less than two months after date. Notes, (payable to the bearer or to order,) for any definite sum not amounting to £.20, and which are made payable out of a contingent fund or on the occurrence of a contingent event, as also deposit receipts from bankers with a clause of interest, are declared liable to duty as promissory-notes¹. On the other hand, all such notes, payable to the bearer or to order, when amounting to twenty pounds, or for an indefinite sum, or of any amount when they are not payable to the bearer or to order, or any instruments, (besides those directed to be deemed promissory-notes,) which, although in the form of promissory-notes, are in law special agreements², (they always paying the agreement stamp,) all notes for less than forty shillings, which are not payable to the bearer on demand, all notes issued by the Bank of England, and, lastly, all notes for one pound, one guinea, two pounds or two guineas, payable to the bearer on demand, which shall be granted by the Bank of Scotland, Royal Bank of Scotland, or British Linen Company, may be issued unstamped. The Bank of England, as well as the other banks now mentioned, are authorised to re-issue their notes as often as they think proper³. The Bank of England is taxed by the act with a composition proportioned to the number of notes which it issues weekly; and the other banks are required to pay certain duties in respect of the notes issued by them, as specified in certain preceding acts⁴.

No document is liable to the stamp laws as a promissory-note, unless it contains a promise to pay. Thus, a mere I O U⁵, or an acknowledgment that a statement of pay-

¹ Schedule, c. Promissory-note.

² In *Green v. Bowes*, and *Green v. Davis*, *Carrington and Payne*, 451-2, 4 B. and Cr. 235, where there were receipts for money from a certain person, concluding with these words, "which I promise to pay," the Court of King's Bench, in opposition to the opinion of Park J. at *Nisi Prius*, held that they did not become valid, though stamped with agreement stamps, being promissory-notes.

³ 55 Geo. III. c. 184, § 20, 23.

⁴ *Ibid.* § 21, 23. *Vide* also 39 G. III. c. 107, and 48 G. III. c. 149, § 16.

⁵ *Children*, 1 D. and Ryl. c. N. P. 8.

ments is correct¹, or that a party had left in the granter's hands £.200², or that the granter had received and held bills for a particular purpose³, is not liable to be stamped as a note, or at all. A document acknowledging receipt of a sum, and promising to pay it⁴, or acknowledging receipt of a sum "which we jointly and severally promise to pay on demand, "with interest⁵," or acknowledging and promising to pay, *and* grant a stamped bill, when required⁶, or saying, "I have received, and shall pay⁶," has been decided to be liable to stamp-duty as a promissory-note. But it has been decided that an acknowledgment of the receipt of money, "for which "I shall account⁷," or which I oblige myself to pay to you at Whitsunday first, or grant you my bill with interest⁸, or acknowledging receipt, "for which we pay interest, and oblige "ourselves to pay the principal, at six months' notice⁹," is not a promissory-note, but may be stamped as an agreement¹⁰. The same decision has been given as to an acknowledgment of the receipt of stock, which the granter promised to pay with interest, viz. for the demands of a stock club in part of the interest, and the remaining stock and interest on demand to the lender, &c.¹¹, and as to an obligation to pay £.5 for the purchase of a cart, though written on a 6d. receipt stamp¹². An accountable receipt for money paid to one party as agent for another, is liable to a receipt stamp¹³.

All paper used for any bills or notes, drafts or orders, must be marked, before the instrument is written, with a stamp corresponding to the duty exigible, otherwise the party ma-

¹ Walford, 1 Bingh. 134.

² Tomkins v. Ashby, 6 B. and Cr. 541.

³ Mullet, 7 B. and Cr. 639; 1 M. and Ryl. 522; Langdon, 2 M. and Ryl. 10; 7 B. and Cr. 640.

⁴ Alexander, 26th Feb. 1830, 8 S. and D. 602; M'Intosh, 13th May 1830, 8 S. and D. 739; Scott, 19th Feb. 1835, 13 S. D. B. 490.

⁵ Ashby v. Ashby, 3 M. and P. 180.

⁶ Pirie, 28th Feb. 1833, 11 S. and D. 473.

⁷ Pirie, note 6.

⁸ Martin, 25th June 1833, 11 S. and D. 782.

⁹ Miller, 4th Dec. 1834, 13 S. and D. 117.

¹⁰ Pirie, note 6; Martin, note 8.

¹¹ Bolton, 1 N. and Mann. 412.

¹² Ellis v. Ellis, Gow, 216.

¹³ Catt, 3 Starkie, 4.

king, signing, issuing, or causing these things to be done, or accepting, or paying, or causing to be accepted or paid, shall forfeit £.50¹; and the instrument shall not "be pleaded "or given in evidence in any Court, or admitted in any Court "to be good, useful, or available in law or in equity²." This has been accordingly held with regard to a bill written on too low a stamp³. In an earlier case⁴, the circumstance of a bill being written on a wrong stamp was held to be a ground of nullity against a decree of constitution, and an adjudication and sale following on it.

Even when a debt is otherwise acknowledged, reference cannot be made to the bill, in order to ascertain, either who is the party entitled to the debt, or its amount, or any thing else necessary to give the admission full effect⁵, nor can an unstamped document be looked at, in order to see on what terms a previous bill was cancelled⁶. But it has been decided, that a note in which a material alteration has been made, though void as a security, may be given in evidence of the original debt for which it was granted⁷. This doctrine does not seem reconcileable with the preceding rule, which appears to be now fully established.

It has been held, however, that the circumstance of a note being improperly stamped does not render it inadmissible in

¹ 55 G. III. c. 184, § 11.

² This is enacted by 31 G. III. c. 25, § 19, which expressly prohibits the affixing of the stamp after the instrument is engrossed. The 55 G. III. c. 184, § 8, re-enacts, with reference to the duties enacted by it, all the powers, clauses, regulations, penalties and forfeitures imposed by former acts of Parliament, so far as not inconsistent with it. This clause of the 31 G. III. c. 25, must therefore be held to be re-enacted. The 34 G. III. c. 32, which authorised the Commissioners to stamp bills, &c. after they were written, on payment of a certain penalty, was temporary, and has expired.

³ *Gall v. Middleton*, 11th June 1828, 6 S. and D. 943.

⁴ *Stewart's Creditors*, 29th Feb. 1812, F. C.

⁵ *Jardine v. Payne*, 1 B. and Ad. 602, overruling *Bishop v. Chambre*, 1 D. and Lloy. 83; *Walker v. Spiers*, 14th May 1834, 12 S. and D. 586; *Greenock Bank v. Darroch*, 12th Dec. 1834, 13 S. D. B. 190.

⁶ *Sweeting v. Halse*, 9 B. and Cr. 365. It is doubtful, therefore, whether an indorsement which is referred to in *Leeds v. Lancashire*, 2 Campb. 205, as qualifying a note, could have been looked at, unless stamped with a separate stamp. *Vide Chitty*, 161, and *Stone v. Metcalf*, 1 Stark. 53; 4 Campb. 217, *per Lord Ellenborough*.

⁷ *Sutton v. Toomer*, 7 B. and Cr. 416; 1 M. and Ryl. 125.

support of an action for usury¹. The enactment 31 G. III. c. 25, § 19, now quoted, appears to be designed merely to protect the revenue, by precluding any person from founding on a bill or note unstamped, or improperly stamped, as evidence in his own favour, not to hinder the employment of such documents as evidence of offences or crimes. It has been also held, that, in an action for a debt, founded on other evidence, an unstamped note may be looked at to ascertain whether the granter was intoxicated when he signed it².

A bill, setting forth the terms of an agreement between landlord and tenant, cannot be tendered in evidence thereof without an agreement stamp³.

It has been held in two recent cases⁴, that an objection to bills or protests under the stamp acts, if omitted by a party in a suspension of a charge on the bill, wherein the suspension has been refused, or the letters found orderly proceeded on a passed suspension, is excluded afterwards by the plea of competent and omitted.

It is of no importance, according to the law as it now stands⁵, although a bill or note, order or draft, should be

¹ *Per* Abbot, J. at Guildhall, Chitty, 140, note *d*.

² *Gregory v. Frazer*, 3 Campb. 454.

³ *Nicholson*, 3 Stark. 128.

⁴ *Napier v. Carson*, 7th Feb. 1828, 6 Shaw and D. 500, F. C.; *Barbour v. Grierson*, 27th May 1828, *ibid*. 866.

⁵ The stamp laws have undergone several variations on this point. Without going farther back, it may be mentioned, that the 31 G. III. c. 25, § 6 and 19, requires that bills of exchange or notes shall be written on a stamp denoting the proper rate or a higher rate of duty, but not referring to the denomination of the stamp; and hence, in *Chamberlain v. Porter*, 1 Bos. and Pull. Rep. 34, Mansfield, C. J. held, that, if the question had turned on this act alone, a stamp *ad valorem*, of whatever denomination, would have been sufficient. But the 37 G. III. c. 136, § 5, 6, enacted, that, when bills or notes were written on stamps of a different denomination from that required by it, the Commissioners should have power to stamp them with the proper stamp; and the inference therefore seemed to be, that, when this remedy was not adopted, the instrument would not be valid. Accordingly, in the case of *Chamberlain v. Porter*, now cited, the Court of C. P., proceeding on this construction of the act, decided, that action could not lie on a promissory-note stamped with a receipt stamp, though of the proper value. In the previous case of *Manning v. Livie*, 1796, Bayley, 100, where the act 31 G. III. was in question, Lord Kenyon non-suited the indorsee of a note, on the ground that it had been written on a 7s. deed stamp. In another case, the Court of King's Bench decided, under the 37 G. III. c. 136, that bills or notes written even on bill stamps of greater value than that required by the act were invalid, in respect that they

written on an improper stamp, provided it is for an equal or a greater sum than the proper stamp, and that the stamp is not specially appropriated to some other instrument, by having its name written on the face thereof. But the 37 Geo. III. c. 136, § 56¹, (which, on that point, appears to be still in force,) gives power to the Commissioners to stamp any bill or note, draft or order, with the proper stamp, on payment of the stamp-duty, with a penalty of 40s. if the stamp is affixed before the term of payment, and otherwise with a penalty of £.10; a receipt for the duty and penalty being given on the back of

were not of the proper denomination which the act prescribed; *Farr v. Price* 1 East, 55. A different decision was given in Scotland with reference to the same act, *Bowack Petr.* 21st June 1804, *Morr.* 20, App. v. Bill, where the Court sustained a bill written on a 3s. instead of a 2s. bill-stamp. The argument there was, that both stamp-duties were appropriated to the same purposes. In the case of *Farr v. Price*, this argument had been disregarded, as the prohibitory words of the act were held to be express. The Court of King's Bench, however, gave effect to this argument in a subsequent case, *Taylor v. Hague*, 2 East, 414, where action was sustained on a promissory-note, written on a 2s. stamp instead of a 1s. 6d. stamp, after it had been ascertained that the different parts of the 2s. stamp were applicable, though in larger proportions, to the same purposes to which the parts of the 1s. 6d. stamp were applicable. But all these questions were superseded by 43 G. III. c. 127, § 6, which renders bills or notes valid, though written on stamps of greater value than the law requires, provided they be of the denomination required for such instruments. Lastly, the 55 G. III. c. 184, § 10, provides that instruments, written even on stamps of an improper denomination, shall be valid, provided they are of equal or greater value than the proper stamp, unless the stamp has been specially appropriated to another instrument, by having its name on the face of it.

¹ The 31 G. III. c. 25, § 19, had enacted, that such instruments should not be valid, unless stamped with the duty required by it, or some higher duty contained in the same act, but without distinguishing whether such stamp should be of a proper denomination or not. It also enacts, by the same section, that it shall not be lawful for the Commissioners to affix the proper stamp after the instrument is engrossed. But the clauses (already cited) of the 37 G. III. repealed this enactment *pro tanto*, and substituted that which has been now stated. The act 44 G. III. c. 98, while it repeals the duties enacted by the 37 G. III. and substitutes new ones, re-enacts, with regard to the new duties, all the rules contained in former acts, so far as not expressly repealed; and the act 48 G. III. c. 149, § 3 and 8, renews all the powers conferred on the Commissioners by any former acts of Parliament; and particularly (§ 8.) the powers granted with respect to the duties repealed by the 44 G. III. c. 98. On the other hand, the existing stamp act, (as already cited, § 8.) renews all the powers conferred by former acts, so far as not inconsistent with it. The power, therefore, referred to in the last act, as restored by the 37 G. III. appears to be still in existence.

the bill or note, draft or order, and such instrument, when so stamped, having the same force as if it had been duly stamped at first. It follows from what has been stated, that, except in the case now mentioned, it is not lawful for the Commissioners to affix the proper stamp to any bill or note, draft or order, after it has been engrossed. For instance¹, an instrument assumed to be a promissory-note, which had been written, at first on a 3d. receipt stamp, instead of a 3s. bill stamp, as required by the 48 G. III. c. 149, then in force, although afterwards stamped by the Commissioners with a £.1 agreement stamp, was held to be invalid in the hands of the original payee's executrix, as there was no authority for thus stamping it *ex post facto*, seeing the original was not even of the proper amount, and as the fact of its being thus stamped appeared from the instrument itself. Besides, the stamp affixed to it, being an agreement stamp, was not applicable to a bill or note. But, if a bill or note should be stamped by the Commissioners, there is reason for holding that the circumstance of its being originally unstamped will not be sufficient to nullify it in the hands of a party who has no means of knowing, from the face of the instrument or otherwise, when the stamp was affixed², although it may be held, from some analogous cases as to policies of insurance, which were stamped after being executed³, that a bill or note, &c. would not be valid in the hands of an original party, who knew that it had been at first unstamped.

With regard to the sum for which stamp-duty is payable, it was once made a question⁴, whether a stamp corresponding to £.50 covered a bill granted for that sum with interest. Lord Ellen-

¹ Green v. Davis, 4 B. and C. 235; 6 D. and R. 306; *vide* also Butts v. Swan, 2 Br. and Bingh. 84.

² Wright v. Riley, Peake 173, *per* Lord Kenyon.

³ Roderick v. Hovil, 3 Camp. 103, and Rapp v. Allant, *id.* p. 106, note. The act 31 G. III. c. 25, § 19, while it prohibits the Commissioners from affixing the stamp after the bill or note is engrossed, does not declare the instrument to be absolutely null if the stamp should be so affixed, though it is reasonable to believe, that action would be denied upon it to any party who knew that it was unstamped when written, since he must have known that the after-stamping was prohibited. The act with regard to policies of insurance is nearly in the same terms. In neither case is the instrument, when post-stamped, declared to be null in the hands of any party whatever.

⁴ Israel v. Benjamin, 3 Camp. 40.

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borough held, at *Nisi Prius*, that it did; because the bill, when granted, was merely a security for £.50, there being no interest then due, and interest being always recoverable if the bill should not be paid when due, whether it was stipulated or not. But the cause was decided on another ground. The same point, however, occurred afterwards in a stronger case¹, where a note was granted for payment of £.30, with interest *from the date thereof*. In that case, the Court of King's Bench decided, that a stamp corresponding to £.30 was sufficient, holding that the stamp duty was imposed on the sum due at the date of granting the instrument, not on any interest which might afterwards become due, and instancing the case of bonds, where the stamp was always regulated by the principal sum.

When a bill or note is written on too low a stamp², (and likewise of course when it is unstamped,) it cannot be considered as payment of a debt; and therefore a party taking it as such is entitled to recur to his original claim, which is open to him, though he should have neglected to present the bill or note for payment when due, or though he should be precluded from recovering on it for want of a proper stamp³. But when there is no relation between the parties, except what

¹ *Prussing v. Ing*, 4 Barnew and Ald. 204. The same thing was held, in the case of a bond, in *Dixon v. Robinson*, 2 M. and Malk. 115, 5 C. and P. 96. *Vide also* *Dearden v. Binns*, 1 M. and Ryl. 130.

² *Wilson v. Vysar*, 4 Taunt. 287. A similar decision was given in *Ruff v. Webb*, 1 Esp. 129, where an order by the defendant on his banker in London, which he had given in payment of an account, being held by Lord Kenyon to be a bill, his Lordship farther found, that it was not valid without a stamp; and that therefore the plaintiff was entitled, without presenting it for payment, to sue on the original consideration. The like decision was given in *Cundy v. Marriott*, 1 B. and Ad. 696. The case of *Swears v. Wells*, cited by Chitty, 144, note *a*, does not appear to prove the contrary, since it was there held that the plaintiff had agreed to give a month's credit for the balance of his debt, on receiving the rest in money; and that, therefore, though he had got a note for the balance on an improper stamp, he was bound either to have applied for a proper note, or waited till the month expired. The case of *Chamberlain v. Delarive*, which the same author likewise cites on this point, does not seem applicable.

³ This was held in the following cases, viz. *Alves v. Hodgson*, 7 T. R. 243, where the plaintiff, though found not entitled to recover on a note for want of a stamp, was allowed to prove his claim for wages, for which the note had been granted; *Tyte v. Jones*, 1 East, 58, note *a*, where a note sued upon for money

depends on the bill or note, as in a question between a remote indorsee and the acceptor, the former has no remedy if the stamp is defective; and in England, he will not obtain relief, even in a court of equity¹. But where a party who agreed to give a valid note had given one on an improper stamp, a court of equity will oblige him to give another in terms of his agreement². When a payment has been made specifically on account of a bill which was void under the stamp-laws, from an alteration on it, it has been decided that it cannot be retracted and applied to another bill due by the same party, against which there is no objection³.

As to the re-issuing of bills or notes, the last stamp act contains various regulations, of which it may be proper to give a brief outline.

1. Any banker or other person who has issued notes duly stamped, payable to the bearer on demand, for any sum not exceeding £.100, may re-issue them after payment, without any duty, as often as he thinks proper⁴; it being farther provided, that there shall be no new duty, if such notes are re-issued by and as the notes of one or more of those who at first issued them, and of any other person or persons in partnership with him or them jointly. It is farther enacted, that, if such notes have been made payable at first at a different place from that where they were drawn, they may be re-issued with any alteration, but only in the house or place where they are payable⁵. No promissory-note, payable to the bearer on de-

lent, being unstamped, Lord Kenyon, notwithstanding, allowed the defendant's acknowledgment of the loan to be proved under the count for money had and received; *Stewart v. Mason*, 1st June 1808, cited 1 Taunt. 354, where the same principle was recognised by Lord Ellenborough; *Wilson v. Kennedy*, 1 Esp. 245, and two other cases, *Brown v. Watts*, 1 Taunt. 353, and *Wade v. Beasley*, 2 Esp. 7, where the doctrine was admitted, although the plaintiff was precluded from the benefit of it, by an objection in point of form.

¹ *Toulmin v. Price*, 5 Ves. 240. In this case it was held generally, that if an unstamped note, being the only ground of debt, were lost, a court of equity could grant no relief; because the note on which alone any claim rested could not be of the smallest value, though it were found; *vide* also cases, *ante*, p. 36.

² This opinion was expressed in *Aylett v. Bennett*, 1 Anstr. 45, though the plaintiff declined to avail himself of what the Court held to be the agreement.

³ *Biggs v. Dwight*, 1 M. and Ryl. 308.

⁴ 55 G. III. c. 184, § 14.

⁵ *Ibid.* § 15.

mand, can be issued with the date printed, under a penalty of £.50 against the person issuing, for each note so issued ¹.

It is enacted, that no bankers or other persons, (excepting the Bank of England, whose case has been already mentioned,) shall issue any notes re-issuable, as already described, without taking out an annual licence for that purpose, under a penalty of £.100 ². The requisites of the licence are detailed in the act ³. It is provided ⁴, that no banking company, banker or other person, shall be obliged to take out more than four licences in all for any number of towns or places in Scotland; and that, if they issue such notes at more than four different places in Scotland, (having previously taken out three distinct licences for three such towns or places,) they shall be allowed to include all the rest in a fourth licence. It is farther provided, that a licence of this kind for a partnership shall remain in force, (notwithstanding any alteration in the partnership,) for the purpose of issuing notes under the firm specified in it, till the 10th of October inclusive after its date.

Any notes or bills, drafts or orders, not allowed by the act to be re-issued, are declared to be vacated upon payment, and not to be negotiable or available, and the person paying is required to cancel them; and it is farther provided, that any person re-issuing, or causing or permitting them to be re-issued, shall forfeit £.50 for each note or other document re-issued, besides payment of the duty chargeable on such note or other document for the first time; and that any person taking them in payment or security, while he knows that they are thus illegally re-issued, shall in like manner forfeit £.20 ⁵.

It has been decided ⁶, that, when a bill, originally payable to the drawer, has been returned on him by an indorsee, with the indorsations subsequent to that of the drawer scored out, he may re-indorse the bill to a third party without a new stamp; it being held that a bill is not extinguished till it has been paid or discharged by the acceptor.

The law as to stamp-duties for protests on bills or notes shall be considered when protests are discussed.

¹ 55 G. III. c. 184, § 18.

² Ibid. § 27.

³ Ibid. § 24 and 27.

⁴ Ibid. § 25. Also 7 G. IV, c. 67, § 13.

⁵ Ibid. § 19.

⁶ *Callow v. Lawrence*, 3 M. and S. 95.

2. The second requisite in bills or notes is the subscription of parties.

By the law of Scotland, no person can be bound, (except in two cases to be immediately mentioned,) either as drawer, acceptor, or indorser of a bill, or as maker or indorser of a note, unless he has subscribed it.

An early statute¹ requires the granter's subscription to all obligations of importance, which are understood to mean obligations for any sum exceeding £.100 Scots. That act prescribes, besides, certain other solemnities, still farther extended by a later statute²; but with all of these custom has dispensed in the case of bills and promissory-notes. Though the solemnities required in other cases to authenticate the subscription are thus dispensed with, custom has not dispensed with the subscription itself, which therefore still continues, in general, to be indispensable. In one case, indeed, viz. where the bill or note relates to a sum below £.100 Scots, there is reason to think that subscription would not be absolutely necessary³. There is also another case, in which an equivalent is admitted for the subscription of the drawer of a bill or granter of a note. In England he is bound without subscribing⁴, provided the instrument be written and his name inserted in the body of the bill or note, by himself, or some person authorised by him. A similar doctrine has been recognised in Scotland, in a case⁵, where it was laid down by the Court, that, if a bill is holograph of the drawer, the insertion of his name in the body of it will be equivalent to subscription, though it will not render him liable to summary diligence. But this doctrine would not be applicable to the *drawee* of a bill; for, although he should write the whole bill, including the address which contains his own name, his acceptance could not be presumed without his signing as acceptor; on the contrary, if he did not sign, that circumstance would be held to indicate that

¹ 1579, c. 80.

² 1681, c. 5.

³ *Vide* Lord Glenlee's Opinion in *Kennedy v. Watson*, 25th May 1816, F. C.

⁴ *Vide* Bayley, 38; Chitty, 185; *Elliot v. Cowper*, Str. 609; *Taylor v. Dobbins*, *ibid.* 309; *Erskine v. Murray*, 2 Lord Raym. 1542.

⁵ A. A. B., July 1750, *Morr.* 1441; *Elchies v. Bill*, No. 47.

he had ultimately resolved not to accept. In all cases but those now mentioned, subscription, by the law of Scotland, appears to be a solemnity essential to the validity of every bill or note, and which, in an action on such documents, could not be supplied even by the oath or acknowledgment of party. In England, on the contrary, a promise by a separate writing¹, or verbally², to accept a bill, has been decided to be an acceptance, though the drawer should not have subscribed the bill; and acceptance has been held to be implied³, even from words that do not amount to an express promise. This looseness of practice has probably been introduced with greater ease, from the want of summary diligence on bills, which, in Scotland, would soon have made us aware of its inconveniences. But English Judges have repeatedly expressed regret, that acceptance should thus have been held as proved by any thing short of a writing on the bill itself⁴; and, in order to remedy this evil, an act has been recently passed⁵, which provides, "that no acceptance of any "inland bill of exchange shall be sufficient to charge any "person," unless it be in writing on the bill, or at least on one of its parts, if there should be more than one part. This proves the expediency of the rule which has been long adopted in Scotland. If a party should promise by letter to accept a bill, there might be an action against him in Scotland upon his letter⁶; in which action the bill might be produced *in modum probationis*; or, if he had promised verbally to accept, and the holder of the bill had suffered through his breach of promise, there might be an action against him on his promise, in which parole evidence would be admissible⁷.

¹ *Wynne v. Raikes*, 5 East. 513; *Clark v. Cock*, 4 East. 57-74, and cases therein referred to.

² *Vide* Opinions in *Clark v. Cock*, note 1, and in *Johnson v. Collins*, 1 East. 103.

³ *Clark v. Cock*.

⁴ Lord Ellenborough, and Lawrence, J., in *Clark v. Cock*; Lord Kenyon, in *Johnson v. Collins*.

⁵ 1 and 2 G. IV. c. 78, § 2.

⁶ *Vide* *Fraser's Trustee v. Campbell, Fraser and Co.* 28th May 1823, 2 Shaw, 346, where the Court decreed for the amount of a bill, on the ground of a letter in which the defenders had promised to accept it.

⁷ *Vide* on this subject, the case of *Hay*, 13th Feb. 1822, 3 Murray's Rep. 9, where parole proof of acknowledgment of an acceptance was admitted, even

It has been suggested, that even verbal acceptance of a bill may be held to complete that assignation to the payee, (which the drawing of the bill implies,) of the money belonging to the drawer which is in the drawee's hands¹. But the contrary appears to have been lately decided². Neither diligence nor action can be raised against any person *as a party* to a bill or note, (except in the cases already mentioned,) unless he has subscribed it.

The subscription must be in writing ; but it has been held³ to be effectual, though written in pencil⁴.

Various substitutes have been received in place of the full subscription of a party, when he is unable to adhibit it.

1st, When a party could not write, the Court sustained⁵ a bill subscribed for her by one notary before two witnesses, though these witnesses were not described in the bill itself, but only in the notary's doquet ; which, however, it was contended, formed a part of the bill. There was another objection to the bill, viz. that it bore annual rent from its date ; but the Court repelled both objections. In a later case⁶, the Court decided that a bill was void, though subscribed by two notaries, when there were no witnesses attesting their subscriptions. Some of the Judges remarked, that, in the preceding case, the chief reason for sustaining the bill was, that the defender was alive, and did not deny that she had authorised the subscription ; whereas, here, the party was dead. But it does not appear to be required, in any case, that a bill should be subscribed by two notaries and four witnesses, in terms of the act 1579, c. 80, which seems applicable only to more formal deeds. The case first noticed appears to establish that one notary and two witnesses are sufficient ; and, indeed, the objection in the subsequent cases was, not that there was only one notary and two witnesses, but that the witnesses were not described in the bill. From what is said, however, to have been the ground of deciding the last

in a suspension of a charge on a bill on the ground of forgery, and *Halliday v. Rule*, 3 Murr. 119, to the same effect.

¹ 1 Bell's Comm. 398.

² Cullen, 18th June 1833, 11 S. D. B. 733. *Vide* Chapter on Acceptance.

³ *Geary v. Physic*, 5 B. and Cr. 234 ; 7 D. and Ryl. 653.

⁴ *Dinwoodie v. Johnston*, 28th June 1737, Morr. 1419.

⁵ *Buchanan v. Duncan*, 27th June 1765, Morr. 1451, and 16985.

of these cases, it remains still uncertain, in the event of a party not admitting his subscription, *1st*, Whether it is necessary to describe the witnesses, or whether it is not enough that they were present? and, *2dly*, Supposing it necessary to describe them, whether a description of them in the notary's doquet is sufficient? Their signature appears, from the case last cited, to be indispensable.

2dly, Our law has gone farther, by holding the initials of a party's name, or even a mark adhibited by him, to be in some cases equivalent to subscription. Even in deeds wherein the statutory solemnities are required, it appears to be now settled¹, that the initials of a party are equivalent to his full subscription, (this mode of subscribing being always attested, like any other, by the proper statutory solemnities,) when he is either in use to subscribe by initials, or cannot subscribe in any other way. In bills and notes, the statutory solemnities are not required to attest a subscription by initials, more than any other kind of subscription. But some kind of evidence has been always required, both to prove that the party did sign, and that this was his usual mode of signature. In an early case², which was an action against a husband on a note granted by his wife before marriage, her subscription by initials was sustained, when supported by one subscribing witness, a woman, and by her own oath as an adminicle of evidence. Again, the subscription to a bill by initials of a person deceased was sustained³, it being proved that this was his usual mode of subscribing, and that the signature resembled his ordinary subscription, and the writer of the bill having deponed, besides, that he saw him sign. On the other hand, an ignorant country woman, who had never

¹ *Vide* Tait on Evidence, 66, 3d edition, and cases therein referred to; likewise *Weirs v. Ralston*, 22d June 1813, F. C., in which a woman's subscription by initials to a deed of importance was sustained, there being a subjoined attestation by a notary, that she declared "she cannot write but by her initials."

² *Wilson v. Robertson and Abercromby*, 2d Feb. 1688, *Morr.* 12493.

³ *Thomson v. Shiel*, July 1729, *Morr.* 16810. In an old case, *Stewart v. Stewart*, 25th June 1679, 2 *Brow. Supp.* 475, the subscription of a bond for 2000 merks, by initials, was sustained, it being proved that the party was in use so to subscribe; and reference is there made to an earlier case, where a bond for £500 (*Scots*) had been sustained, though it was subscribed by a mark "like a *craw-tae*."

been in use to write, and could not even read, having filled up the initials of her name to a bill in blank scores traced by another person for that purpose, the Court¹ decided that the bill was null; it being successfully argued, that this was not her ordinary subscription, and could not be called a subscription at all, or even properly a writing. In the next case², a party's acknowledgment that she had subscribed her initials to three bills for 100 merks each, was justly held sufficient without other proof; the Court being so clear as to the validity of the bills, that, in a reduction, they refused a petition against the Lord Ordinary's interlocutor sustaining them, without answers. In a later case³, which was an action on a promissory-note said to have been indorsed to the pursuer by the initials of a person deceased, (although the note was found in the pursuer's possession, and though he alleged that she had mentioned to several persons both her intention to bestow this debt upon him, and the fact of her having done so,) yet the Lord Ordinary, in respect the pursuer admitted "that he" "could not prove that the deceased did actually adhibit her" "subscription by initials" to this note, held that the indorsement was null; and the Court, without difficulty, affirmed the judgment. There was here no proof of subscription; and the pursuer's averments resolved merely into a belief by the deceased that she had transferred the note, which act she might perhaps suppose erroneously to be completed, by mere delivery, without subscription. The result of all these decisions appears to be, that, besides the initials of the party, there must be sufficient evidence, (though there is not any fixed rule as to the precise amount of evidence required,) both that these initials were written by him, and also that this was his usual mode of signature, except perhaps when the subscription is proved by his acknowledgment. There can be no summary diligence on bills or notes so subscribed⁴, because the reality of the subscription is not ascertained *ex facie* of the document, but must

¹ Pringle v. Keill, Feb. 1735, Morr. 16810.

² Shepherd v. Innes, 19th Nov. 1760, Morr. 589.

³ M'Ilwraith v. M'Micken, 23d June 1785, Morr. 16820.

⁴ In Monro v. Monro, 14th Nov. 1820, 1 Bell, 390, summary diligence is said to have been refused on a bill signed by initials, with two subscribing witnesses. *Vide*, in support of the reason given in the text, the case of A v. B, *supra*, p. 43, note 5, Morr. 1441.

be proved by extrinsic evidence, so that the bill or note cannot in itself afford a warrant for summary diligence. This reason appears to be sufficient, without supposing, as has been held¹, that such documents are not to be considered as bills or notes at all, but merely as documents of debt. Indeed, it is only because they are considered as bills or notes, that they are, from favour to commerce, admitted even as documents of debt, without the statutory solemnities required in more regular deeds. They are also entitled to all the other privileges, and subject to the same rules of negotiation with bills or notes, though they cannot, for the reason now mentioned, afford warrant for summary diligence. On the other hand, summary diligence would probably be competent on a bill or note signed by notaries for a party who could not write, if their signature was attested by subscribing witnesses fully designed; because such a subscription is *prima facie* authentic, as well as a similar subscription to a bond, which, supposing it to have a clause of registration, would undoubtedly afford warrant for summary diligence.

3dly, Subscription by a mark is not admitted at all in deeds requiring the statutory solemnities², even though it should appear to be the party's usual mode of signature. It is probably held, as was argued in the case of M'Ilwraith, already cited³, that when the mark does not resemble even the initials of the party's name, it cannot in any sense of the word be reckoned a *subscription*, which is required by statute in all such deeds. But custom has sanctioned such a mode of signature in bills and notes. In a case now cited⁴, it appeared that bills, to a considerable amount, subscribed by the party in this manner, had been habitually discounted by the Stirling Bank. Such documents, thus subscribed, have also been sustained from an early period. In a case reported by Lord Stair⁵, which was a reduction of a decree against the drawer of a bill for £.200 sterling, brought on the ground,

¹ 1 Bell, 390.

² Din v. Gillies, 18th June 1812, cited in a note to Fac. Report of Weirs v. Ralston, 22d June 1813.

³ P. 47, note 3.

⁴ Din v. Gillies, note 2.

⁵ Brown v. Johnstone, 26th Feb. 1662, Morr. 16802.

that there was merely a mark on it, with these words written round it in an unknown hand, "Archibald Johnstoun his mark," the Court, while they thought that this would be sufficient among merchants, without witnesses, (it being alleged that the drawer was a merchant and drover, and was in use so to subscribe,) yet, as there was neither custom nor decision for it, they, in respect of his alleged custom so to subscribe, ordered, *ex officio*, that, before answer, the oaths should be taken of the writer of the bill, if known, and also of the witnesses who saw Johnstone subscribe the mark, or receive value for the bill. In this case there were no *subscribing* witnesses. Another case afterwards occurred between the same parties¹, regarding a bill for £.1200 Scots, likewise signed by the defender's mark, before two subscribing witnesses. The defender did not appear. The subscribing witnesses deponed that he was "accustomed so to subscribe;" and one of them, that "he saw him put this mark to the bill in question." Several others deponed, "that they had accepted such bills in regard of his custom, and had obtained payment from him, without any debate thereupon." The question, it is said, then arose, Whether there had been any case where a sum above £.100 Scots was held proved by a mark, without subscription of the name, or at least the initials? And it is stated, that, although the Court had demurred in the former case, in order to ascertain whether there was any case on this point, they had found none. It was then moved that the defender should be examined, not by way of reference, but *ex officio* or *de calumnia*, whether he had signed the mark; but the majority would not delay deciding the cause, as the pursuer was dying. They, therefore, in respect of the specialties of the case, (among which the circumstance of this being a bill among merchants, and of the defender's custom so to subscribe bills of greater importance, and his non-appearance, are particularly mentioned,) sustained the bill; it being stated, however, that this was not to be a general rule, and many of the Judges being against the decision, even when so qualified, as tending to encourage forgery. In a later case², where summary diligence had been

¹ Brown v. Johnstone, 1st Feb. 1669, Morr. 16903.

² Cockburn v. Gibson, 8th Dec. 1815, F. C.

raised on a bill for £.76, against a party who admitted that he had signed it by a mark, before two subscribing witnesses, the Court suspended the diligence. But, in an ordinary action which had been raised at the same time upon the bill, they decerned against him, after production of certain letters signed by the defender's mark, before witnesses, in which he acknowledged that he had accepted several bills to another defender, all for value, and, among others, a bill for £.175, which had been given up to him in consideration of the bill in question, this being, in fact, an admission that value was given for the bill. This decision, however, may not perhaps have proceeded on the bill alone, but may have been also founded on the other written evidence produced¹. In an earlier case², which was a suspension (by the acceptor) of a charge on a bill, bearing to be drawn and indorsed by a mark without the attestation of witnesses, the Court suspended the letters, holding that such a subscription was ineffectual, unless it appeared on the face of the instrument that the mark had been adhibited before witnesses. They also refused to examine the drawer regarding his subscription, as he was not a party to the case. In a later case³, which was an action on a bill for £.5, bearing to be signed by the mark of a party deceased, and without subscribing witnesses, the Court allowed a proof before answer, that the party so subscribed it, and that this was his usual mode of subscribing. One of the Judges, (Lord Glenlee,) alluded to the circumstance of the bill being for a sum below £.100 Scots. But the opinions of the majority of the Court appeared to go this length, that any bill signed by a mark, (though the signature was not attested by subscribing witnesses,) might be sustained as the ground of an ordinary

¹ Reference was made, in the pursuer's pleadings in this case, to an unreported case, *Ker v. Ferguson*, 29th Jan. 1802, where the signature of a bill by a mark is said to have been sustained, as that was the party's usual mode of subscription; and likewise to a similar decision given with regard to a signature by a mark, in an unreported case, *Cameron v. Macfie*, 29th Jan. 1803. In another unreported case, *William Russell*, 17th Dec. 1811, mentioned in the same pleading, the Court is said to have suspended a charge given on a signature by a mark; but one of the Judges is stated to have expressed an opinion, that it might be the ground of an ordinary action.

² *Stewart v. Russell*, 11th July 1815, F. C.

³ *Kennedy v. Watson*, 25th May 1816, F. C.

action, if the fact of subscription was sufficiently proved. At the same time the interlocutor only allowed a proof before answer. Reference was made in the pleadings to an unreported case¹ already mentioned; and one of the Judges alluded to another case², in which the Court, following the precedent of *Brown v. Johnstone*, confirmed a sentence of the Sheriff of Lanarkshire, allowing a proof before answer, of the indorsation of a *bank receipt*, by a mark adhibited before subscribing witnesses.

In an English undefended case³, it was admitted, with some hesitation, as evidence of subscription by a mark, that the party had been in use so to subscribe, and that the witnesses pointed out some peculiarity in her subscription. In a recent Scotch case⁴ regarding indorsation by mark, before witnesses not subscribing, of a bill for £.5, the majority of the Court would have held this a bad title to the indorsee, (distinguishing between such an indorsation, and the subscription of the drawer, if he had sued on the bill); but the right was held to be homologated by partial payments. In another case, when all the parties to a bill bearing to be signed by three acceptors were dead, the subscription of one of the acceptors by a mark, though not attested by witnesses, was allowed to be proved, and was held to be proved by facts and circumstances, as by her being in use to subscribe obligations by a mark, her having acknowledged the debt in the bill, &c.⁵

It is not easy to deduce a precise rule from the foregoing decisions. But it may be stated, *1st*, That a bill or note signed by a mark in presence of subscribing witnesses will be sustained, if the facts of the party's signature, and of it being his custom so to subscribe, are sufficiently proved; and, *2dly*, That according to the cases already cited, such a proof would probably be admitted, although there were no subscribing witnesses on the bill.

For the reason, however, already stated, with reference to bills or notes subscribed by initials, no summary diligence can

¹ *Cameron v. Macfie*, p. 50, note 1.

² *Lindsay v. Robertson*, Jan. 1815, Session Papers in my possession.

³ *George v. Surrey*, 1 M. and Malk. 516.

⁴ *M'Ileoch v. M'Intyre*, 2d Dec. 1826, C. F.

⁵ *Craigie v. Scobie*, 23d Mar. 1832, 10 S. D. B. 510.

be competent on such documents when subscribed by a mark, although the objection to such diligence may be excluded by homologation of the debt, and by other circumstances¹.

The subscription to bills or notes, (except when by initials or by a mark,) is received in evidence *per se*, without parole evidence, as in England, that the subscription is genuine. This rule applies in Scotland to bills and notes, in common with all those instruments which are either executed with the solemnities required by statute, or are, from favour to commerce, privileged with an exemption from them.

The subscription to a bill or note must be absolute. A conditional or alternative obligation, being inconsistent with the nature of such a document, cannot be legally coupled with a party's subscription².

It was long made a question in Scotland, whether a bill without the drawer's subscription could be indorsed by the payee, or could produce action at the holder's instance against the acceptor or any prior indorsers. Such bills were objected to, on two grounds, viz. *1st*, That a bill, being a request or mandate by the drawer on the drawee to pay a certain sum, was not complete till both these parties had signed it; and, *2dly*, That, when the bill was in favour of the drawer, it fell under the act 1696, c. 25, which enacts, that "no bonds, assignments, dispositions, or other deeds, be subscribed blank in the person or person's name in whose favours they are conceived;" and that, unless such name be inserted before delivery in presence of the subscribing witnesses, "all writs otherwise subscribed and delivered blank, as said is, shall be declared null." On these two points, the decisions of the Court fluctuated for a long period. But, as the law with regard to them is now settled, it is needless to detail the earlier decisions, which lead to no certain result, and are now to be referred to only as matters of curiosity³. In the first two

¹ *M'Intosh v. M'Donald*, 9th Dec. 1828, 7 Shaw and D. 155.

² *Ferris v. Bond, Bayley*, 39; 4 B. and A. 679.

³ *Vide* on this subject, against such bills, *Brand v. Tenants of Riccarton*, 13th Feb. 1711, *Morr.* 1679; *Walkinshaw's Executors v. Campbell*, 8th Jan. 1730, *Morr.* 1684; *Nelson v. Russell*, 14th Feb. 1734, *Morr.* 1435, 1508, 1685; *Elchies*, v. i. 1, v. ii. 3; *M'Caul v. Logan*, June 1728, *Morr.* 1694, and cases there referred to; *A v. B*, 1738, *Morr.* 1436, supposed to be *Mac-Raith v. Murdoch*, 6th Dec. 1738, *Elchies*, No. 16, v. Bill; *Henderson v.*

cases which require particular notice, although the decision was favourable to the party suing on the bill, it seems to have been implied, that the bill would have been held null, if it had been blank in the creditor's name. The first of these was a case ¹ where a bill was accepted payable to a third party, but where there was no drawer's subscription. This last circumstance being stated as an objection to the bill, the Court, in respect that the creditor's name was inserted in the body of the bill, and that it had all the requisites of a promissory-note, repelled the objection. It seems to be implied, however, in these reasons, that, if the creditor's name had been blank, the bill would have been held null, in terms of the act 1696. In the next case ², an accepted bill being objected to in a competition of creditors, as not subscribed by the drawer, the Court considered the objection as obviated by the circumstance of the creditor's name being indorsed on the bill, and receipts for partial payments being inserted over it. The drawer's name, too, is said to have been inserted in *gremio* of the bill, although, on the principles formerly recognised, that could not have supplied the want of his signature, unless the bill had been written by him. This decision proves that the drawer's signature was no longer accounted essential, though it seems still to be implied in the case, that a blank in the creditor's name would have raised a fatal objection. In the next case ³, however, the Court expressly recognised the doctrine, that a bill was good, though blank in the creditor's name. In that case, a bill being found in the repositories of a person deceased, blank both in the creditor's name and in

Davidson, 27th July 1738, Morr. 1435 and 1686; Douglas and Hood v. Logan, 19th Nov. 1748, Morr. 1438; Bonnar v. Grant, 14th Feb. 1749, Morr. 1441; Robertson and Ross v. Bissett, 25th July 1777, Morr. 1445 and 1676; and in their favour, Sandilands v. Dickson, 12th Nov. 1742, Morr. 1436; Turnbull v. Tudhope, 18th June 1748, Morr. 1437 and 1510; Elchies, v. Bill, No. 62; Cathcart v. Dick's Representatives, 17th Nov. 1748, Morr. 1439; Elchies, v. Bill, No. 41; Bruce and Guthrie v. Hutchison, 6th Dec. 1748, Morr. 1514; Ferguson v. Blair, 31st July 1758, Morr. 1443; Shaw v. Farquhar, 24th Nov. 1761, Morr. 1444. The import of these cases was stated in the first edition of this work.

¹ Drummond v. Drummond's Creditors, 8th Feb. 1785, Morr. 1445.

² Hare v. Geddes, 22d Nov. 1786, Morr. 1446.

³ Fair v. Cranstoun, 11th July 1801, Morr. 1677.

the drawer's signature, (the drawer being evidently meant as payee,) but with a partial payment marked on it, besides which, it was proved, by entries in the books of the deceased, that the drawer had advanced the money, the Court sustained action for payment at the instance of his son and executor, who had filled up his own name as drawer of the bill, before he sued upon it. The creditor's name, in this case, was blank at the time of delivery, and therefore the bill could not be sustained, except on the ground that the act 1696 was inapplicable to bills. It is said to have been held by the Court, 1st, That, as it was evident who was meant to be drawer, this was sufficient in an action for the debt, (there being no charge on the bill); and, 2^{dly}, That the representative of the deceased was entitled to fill up his own name as drawer, and use diligence on the bill. In the next case¹, where a bill payable to the drawer, but blank both in his name and signature, was found among the papers of a person deceased, blank indorsed by him, and the trustee for his creditors brought an action for payment against the acceptor, the objection against the bill under the act 1696, as being blank in name of the creditor, was fully argued; it being maintained against it, that this act did not apply to bills, but only to deeds requiring witnesses, which, indeed, is indicated by the reference that its words bear to the insertion of the creditor's name in presence of the "witnesses to the subscribing." The act, no doubt, exempts from its operation only the indorsation of bills; but it was pleaded that this was not an exception, but a declaratory explanation of the scope of the act, as not being applicable to bills at all. It was also argued, that the bill was not valid as a regular deed, and that it could not be exempted from the solemnities required in deeds, except by being complete as a bill, which it was not; but the answer was, that, according to the law as settled, the acceptance of a bill blank in the drawer's name imposed an obligation on the acceptor in favour of any person who might appear to have the *jus exigendi*. The Court repelled the defences. It may therefore be considered as settled, by this case, that the act 1696 is inapplicable to bills.

¹ Ogilvie v. Moss, 28th June 1804, Morr. App. v. Bill, 21.

The same doctrine is also implied in a later case ¹. In another case ², where the direct question was, "whether action "is competent on a bill found in the depositories of a defunct, "blank in the drawer's name;" the First Division of the Court considered the matter as so much settled, that they would not order answers to a petition on it, lest they should be held to entertain any doubt of it.

It appears to be thus fixed, that the acceptor's obligation is complete by his acceptance, although the bill should be blank, both in the payee's name and in the drawer's signature; and that any person who appears, from other evidence, to have been either intended as payee, or to stand in the payee's right, is entitled, even without filling up these blanks, to demand payment. Such a party, however, as his right is not apparent *ex facie* of the bill, is not entitled to use summary diligence on it. This last point was settled ³ in the case of a bill wanting the drawer's signature, though his name was in the body of it, whereon the Court, on a report from the Bill-Chamber, decided, that horning ought not to proceed; holding, that although the bill might be holograph of the drawer, (in which case his name in the body of it would be equal to his subscription,) yet even the fact of its being holograph required proof; whereas no horning could be given, "but on a writ *ex facie* valid." As to the acceptor's liability in these circumstances, the decision in a case already referred to, where the creditor's name was inserted in the bill ⁴, (and where the drawer's signature only was wanting,) appears to have made him liable on this principle, that the document was complete as a promissory-note. This reason, however, cannot apply where the bill is likewise blank in the creditor's name. The principle applicable to such a case appears to be that stated in another case already cited ⁵, (and which, from the circumstances of that case, probably formed the ground of decision,) viz. that the acceptance of a bill blank in the drawer's

¹ Smith v. Taylor, 27th Feb. 1824, Fac. Col.

² M'Donald's Trustees v. Rankin, 13th June 1817, Fac. Col. *Vide* also Elder v. Marshall, 3d Dec. 1830, 9 S. and D. 433.

³ A v. B, July 1750, Morr. 1442.

⁴ 53.

⁵ Ogilvie, *ante*, 54.

(or creditor's) name, binds the acceptor in favour of any person who may have the *jus exigendi*. This principle has been now recognised to such an extent, (in several cases to be afterwards cited,) both here and in England, that a person who signs a blank bill-stamp as acceptor is liable for any sum afterwards inserted, to which the stamp is applicable. But if, as this doctrine implies, the subscriber gives the holder of the stamp thus signed a power to fill up what sum he pleases, the same power appears to be implied with reference to the whole obligation; and, consequently, with regard to the names of the drawer or creditor, if these have been left blank at the time of acceptance. The holder, then, of a bill thus accepted, seems to be entitled to fill up what drawer or creditor he pleases, and to give the same power to any third party by putting the bill blank into his hands. No doubt, in two cases already cited¹, the holder of the bill likewise proved *aliunde*, that he was in right of the payee. To the same effect, we may mention a case², (of a date prior to the later decisions now referred to,) where a bill being accepted blank in the drawer's name, but payable to a particular person, and that person having given it to a creditor of his, who filled up his own name as drawer, (whereas the payee should have filled up his name as drawer, and then indorsed it to the creditor); the Court held, that the person whose name was so inserted had not a good title, in competition with a creditor of the payee arresting in the acceptor's hands. But, when the acceptor leaves a blank for the name of the drawer or creditor, it seems to follow, according to strict principle, that he renders his obligation available to any person holding it, as if it were a bill payable to the bearer, so that he cannot get free, unless by proving that such holder has become fraudulently possessed of the bill. But, at all events, any person into whose hands the bill comes may fill up his own signature as drawer, and insert any party whom he chooses as payee. Accordingly, it has been held, in a recent case already referred to³, that a person taking a blank bill-stamp, signed by the

¹ Fair v. Cranstoun, Ogilvie v. Moss, *ante*, 53-4.

² Grant v. Cruickshanks, 19th Dec. 1769, Morr. App. v. Bill, p. 1.

³ Smith v. Taylor, *ante*, 55.

holder and another party as acceptors, and advancing money on the faith of it, though he knew that the holder had got it gratuitously from the other subscriber, was entitled to fill up his own name as drawer, and recover its amount from the party who had thus subscribed it. A question was lately raised, in another case ¹, as to the validity of some bills which were found in the repositories of a person deceased, accepted by the defender, but which were all blank in the drawer's name, two in the date, and one in the term of payment. But it related merely to passing a bill of advocacy by the defender, which was allowed on caution. In England, it has been accounted no objection to a claim on a bill against the acceptor, that the acceptor's signature was prior to that of the drawer². To an action by the drawer or payee of a bill thus filled up, there appears to be no defence but fraud; and that defence, even according to the tendency of an early decision already noticed³, cannot be pleaded against an onerous indorsee. On the other hand, the person who is *in titulo* of the bill on the face of it, has a right, both in principle, and on the authority of an opinion already cited⁴, to enforce it even by summary diligence.

It follows, from what has now been stated, that the acceptance of a bill while blank in the drawer's name, (if the signature of the person intended to be drawer is afterwards filled up,) will be an effectual assignation of his funds in the acceptor's hands, to the prejudice of arrestments used after the date of the bill, though previous to the insertion of the drawer's signature; it being held, *fictione juris*, as in a case already cited⁵, that the drawer's signature was inserted at the date of the bill. The doctrine now mentioned appears also to be applicable, if the representative of the intended drawer signs as drawer after the drawer's death; this being the same thing (according to one case already cited⁶;) with the drawer's own signature. Even if a payee named in the bill, or his in-

¹ Fairlie's Trustees v. Brown and others, 12th May 1824, 3 S. and D. 5.

² Molloy v. Delves, 4 C. and Pay. 492. Vide also Collis v. Emmett, post.

³ Turnbull v. Tudhope, 52, note 3.

⁴ Fair v. Cranstoun, ante, 53.

⁵ Cathcart v. Dick's Representatives, 17th Nov. 1748, Morr. 1439; Elchies, No. 41, v. Bill.

⁶ Fair v. Cranstoun.

dorsee, after the drawer's bankruptcy, brings an action on the bill against the acceptor, without the drawer's signature, (it being ascertained, however, from other evidence, who was meant to be drawer,) the bill would, according to the later decisions, be a valid assignation of the drawer's funds in the acceptor's hands, so as to give the holder a good claim for them; and would make the payment of them to him a sufficient defence to the acceptor against the drawer's creditors, or against any arrestment which they might use in his hands after the date of the bill. The payee likewise appears to have the same kind of claim, though his name should be subsequently filled up in a blank left at the time of acceptance, since the drawee, by thus accepting a bill blank in the creditor's name, gives to any holder the power of so filling it up. It is now settled, that the act 1696 against blank writs does not apply to such a case; and, therefore, as the payee, whose name is thus filled up in a bill, is entitled to make it good, it must, in respect of its privileges as a bill, be effectual to him as an assignation of the drawer's funds, as well as to every other purpose. If it should appear, indeed, that the drawer has left the payee's name blank, with the view of employing the bill, according to circumstances, as an instrument for defrauding his creditors, that will afford a good defence against him; or if the bill, while blank in the drawer's name, should get into the hands of a person not contemplated as the original drawer, but who fills up his own name as such, this operation cannot make an effectual assignment of any funds of *his* in the acceptor's hands, (in prejudice of his creditors,) to a party who knew the circumstances under which he signed as drawer. But it would probably be a good assignment to an onerous holder who was ignorant of these circumstances. None of these objections, indeed, would be valid, either against a party who got the bill onerously, while blank in the *payee's* name, and inserted his own name as payee, or against a party whose name was so inserted by a third person for value received. The fact, too, of the holder's non-onerosity or *mala fides* cannot, in general, be proved, except by his writ or oath. This last point shall be afterwards more particularly discussed.

Although the acceptance of a bill, under the circumstances now mentioned, would make an effectual assignment, from its date, of the intended drawer's effects in the acceptor's hands, yet, if acceptance was refused, the mere presentment of the blank bill for acceptance, would not, as in the case of a bill signed by the drawer, operate such an assignment. The drawee's acceptance of the bill while blank in the drawer's signature may imply a recognition of the draft, while in that state, as an effectual assignation from its date, provided the person meant to be drawer be ascertained by other evidence. But it would be carrying the doctrine of implied assignation too far to hold that the intended drawer's funds in the hands of the drawee could be assigned, without either his signature as drawer, or the drawee's acceptance. Acceptance being an obligation to pay conformably with the draft, makes it as effectual as if the drawer had signed it; but the mere presentment of a draft, while unsigned either by drawer or drawee, cannot render it more effectual than it was before presentment.

The principles which have been now stated appear to be applicable to the case of bills written abroad and accepted in this country, while blank in the names of drawer or payee, at least in so far as they are assignations of those funds in the acceptor's hands which belong to the intended drawer; for the forms necessary to complete an assignation must be regulated by the law of the country where the funds are situated. On the other hand, the existence of the document as a bill takes its date from the drawer's signature, and therefore it is to be considered as a foreign or inland bill, according to the time and place where the drawer actually signed it¹. All the decisions already cited on the subject of assignation relate to inland bills. With regard to bills written in Scotland, and accepted in another country, while blank in the drawer's or payee's names, it is impossible to lay down any rule as to their efficacy in assigning the drawer's funds in the drawee's hands, since that must depend on the law of

¹ *Snaith v. Mingay*, M. and S. 87; *Cruchly v. Mann*, and other cases cited *ante*, 29.

the particular country in which the bill is to be made good against the drawee¹.

3dly, Date of bills and notes.

The date of drawing a bill, or of granting a note, is generally marked in figures or in letters at the top of the bill or note. Such date is probative of the time of granting the bill or note. Thus, in an action brought on three accepted bills, by the person having right to them, against the acceptor's heir², who pleaded deathbed, the Court found, that accepted bills prove their dates against the acceptor's heirs, so as to exclude this plea. A similar decision is said to have been given in another case³. It is stated by Bankton⁴, that the bills in the first case, though drawn in Scotland, were accepted in London; and he doubts whether the same rule would be applicable to inland bills. Mr Erskine, too⁵, doubts whether the rule would apply to such inland bills as are payable to the drawer. But the opinion of the Court, as now quoted, applies to all bills without exception; and it would rather appear from the reports, that the bills in question were payable to the drawer. Lord Bankton observes, that this was an action by an indorsee, and he doubts whether the same rule would apply to the payee. But the reports do not bear that the pursuer was indorsee, and he rather appears to have been in right of the original payee as his representative, in which case he was, of course, liable to all the exceptions competent against him⁶. The Court, in a subsequent case⁷, found, (though after a contrary decision at first,) that promissory-notes granted in Ireland, so as to affect heritage in Scotland belonging to the granter, could not prove their own dates, to the effect of excluding the plea of deathbed by the heir. But, 1st, This case affords a proof of the contrary rule being then applicable to all bills, since the heir

¹ *Vide post*, as to bills presented for acceptance in England.

² Kennedy v. Arbuthnot, 8th July 1725, Morr. 1477 and 12651.

³ Johnston v. Strachan, 12th Feb. 1731, Morr. *ibid*.

⁴ i. 13. 20.

⁵ iii. 2. 25.

⁶ The case of Christison, Feb. 1734, which Mr Erskine cites in support of his opinion on this subject, appears not to be applicable.

⁷ Norris v. Wood, 4th Jan. 1743, Morr. 4466.

admits it generally with regard to them ; and, 2^{dly}, Promissory-notes were not then, or for a considerable time afterwards, held entitled to all the privileges of bills ¹. There is, on the whole, reason to believe, (though the point does not seem to have lately occurred,) that all bills, as well as promissory-notes, being now on the same footing in respect of every other privilege, would likewise be held entitled alike to the privilege of proving their own dates, even to the exclusion of the plea of deathbed, and that whether in a question with indorsees, or with the original payees. A similar rule has been laid down in England with reference to the date of a promissory-note, as giving the payee a claim against the grantor's bankrupt estate². But the contrary has been held in two other cases³, where the question was, whether a bill drawn by the bankrupt must be presumed to have been indorsed of its date, viz. before the commission of bankruptcy, so as to support the petitioning creditor's debt.

The date of presentment, or, at least, the date of drawing, (since that, in the absence of contrary evidence, would probably be held to be the date of presentment,) must be inserted in bills made payable at a certain period after sight, in order to ascertain the time of presentment or sight. A date is also essential in bills or notes, to mark the term of payment, when they are made payable a certain number of days after date. But it is not indispensable in other cases⁴, as where the bill or note is made payable at a precise day specified in the body of it. The reason assigned by Mr

¹ *Vide* More v. Paxton, 9th Dec. 1766 ; Greig v. Green, 25th Jan. 1771, Morr. 12259 ; 12 Geo. III. c. 72.

² Taylor v. Kinloch, 1 Stark, 175. A creditor having claimed, under a commission of bankruptcy, on a note bearing date 11th Nov. 1814, Lord Ellenborough admitted that date in a question with the assignees, as *prima facie* evidence of the note being granted before the bankruptcy, so as to form a ground of claim against the estate. Similar doctrine was held in Obbard v. Betham, 1 M. and Malk. 485. But the question there was, whether the date, as appearing *ex facie* of a note, proved its existence at the time of a commission of bankruptcy, and other evidence, though slight, was afterwards also adduced to prove it.

³ Rose v. Rowcroft, 4 Campb. 245 ; Cowie v. Harris, 1 M. and Malk. 141.

⁴ *Vide* Bayley, 25 ; Chitty, 169.

Erskine ¹ for refusing effect to bills which have no date, viz. that they must be intended as permanent securities for sums of money, is inapplicable when the date of payment is specified in the bill or note; and the decision which he cites in support of his opinion ² relates to the case of a bill made to bear interest from its date, which rendered the date material³. It is said⁴, that when the date of a bill is material, (as from the term of payment being fixed with reference to it or otherwise,) and yet does not appear *ex facie* of the bill, it will be computed from the day when the bill was issued. This rule was implied in a recent English case⁵, when it was decided that the date of a bill must be held to be that on which it was made, as set forth in the declaration.

It has been already seen⁶, that when a person signs a blank bill as drawer and indorser, and, at the same time, dates it, this date of drawing is to be considered as the date of the bill, at whatever time the blanks may be afterwards filled up. If the drawer leaves a blank for the date, and the payee fills it up with a date even previous to the time of issuing the bill or note, this date will be the rule of payment, at least in a question with an onerous holder, or with the payee, unless he is proved not to be an onerous holder; because the drawer, by leaving a blank for the date, must be held to have authorised the holder to fill up any date, in the same manner as, by subscribing a blank stamp, he would authorise him to fill up, to the full amount covered by the stamp, whatever sum he chose. Thus⁷, a person, by writing his name as indorser on certain copperplate checks drawn in the form of promissory-notes, but blank in the date, sum, and term of payment, has been held to have authorised the person to whom he gave them to fill up what dates and sums he chose, so as to found a good action

¹ iii. 2. 26.

² Douglas and Lindsay v. Brown, 15th Nov. 1757, Morr. 1429.

³ Vide also on the subject of date, Mackenzie of Fraserdale v. Fraser, July 1743, Elchies, v. Writ, No. 16, which, however, is too special to elicit any general principle.

⁴ Chitty, 169.

⁵ Giles v. Bourne, 6 M. and S. 73.

⁶ Snaith v. Mingay, 1 M. and S. 87.

⁷ Russell v. Langstaff, 2 Dougl. 514.

at the instance of an onerous holder; and, in another case¹, where a bill, with a blank for the date and sum, had been drawn on 28th February by one of the partners of a company, and also blank indorsed by him under the company's firm, and the clerk of the company had, after his death, and after a new company was formed, filled up the blank for the date with 27th February, and likewise the sum, after which the bill was discounted to a third party, this third party was found to have a good claim on it against the surviving partners.

In this last case, the third party had a right to suppose that the bill in question, being filled up with a date prior to the dissolution of the partnership, had been truly completed before it; and, therefore, the surviving partners were justly made liable for giving their clerk a power which enabled him to create such a belief. On the same principle, if an individual puts a blank bill, signed by himself, into another person's hands, so as to enable him, after the subscriber's death, to represent it to third parties as completed before that event, by filling up a prior date, the subscriber's representatives would probably be liable to the *bona fide* indorsees of such a bill, as his act has led third parties to believe that the obligation against him was legally completed. In such a case, their author, and they, as coming in his place, are excluded, *personali exceptione*, from pleading the want of title, as they would be excluded from objecting to a claim by the onerous holder of a bill originally blank, which was filled up with a larger sum than that for which it had been originally granted. But it seems doubtful whether a person who receives a blank bill, signed by the granter, either in his own name or in name of a company, could himself have a claim on it, if he filled it up after he knew of the granter's death, or after the dissolution of the company, with a date prior to these events. For, if the subscription of such a bill implies merely a mandate to the party receiving it to complete the obligation, this mandate, with reference to the mandatary, who knew when he took it what were its limits, becomes incapable of execution, if not executed before the mandant's death; because, after that

¹ *Usher v. Dauncey*, 4 Camp. 97; more fully stated in some points by Bayley, 168, note 83.

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¹ *Usher v. Dauncey*, 4 Camp. 97; more fully stated in some points by Bayley, 168, note 83.

event, no obligation in favour of a party who knows of it, can be constituted against him. On the other hand, if such a signature is held to imply an uncompleted obligation for any sum to which the stamp is applicable, and to draw back to any date which may be affixed in completing it, still it does not become complete till the document has been filled up; and it cannot be so completed, or, in other words, the obligation cannot be constituted against the subscriber after his death. The mere insertion of a date prior to his death, (whatever may be its effect as to third parties,) cannot, as to a party who knows it, alter the fact, that it was truly filled up after his death, so as to make the obligation effectual to the party inserting it. For though the date affords a presumption as to the term of completing the obligation, it may be redargued by contrary evidence, when it has been falsely inserted to conceal a defect in the party's right. This is said to have been held in one case¹, where a bill accepted blank in the date and sum was alleged, (in an action upon it by a creditor representing the 'original holder,) to have been filled up by the latter after the acceptor's death, though with a date prior to it. But the case was taken out of Court by a submission. The same question might probably be raised as to the effect of filling up such a blank signature after the subscriber's supervening insanity², or, in the case of a woman, after her marriage. These remarks, however, are proposed with much hesitation.

An indorsee would seem to have the power, under the limitation now mentioned, of filling up what date he chuses, if the bill or note has a blank for the date when it comes into his hands. But if the date is still blank after an action is brought on the bill, and if it is made payable at a certain time after date, then the date of delivery appears to be the only rule of payment. When that date, and consequently the date of payment, must be thus ascertained by evidence extraneous to the bill or note, it would not probably be the foundation of summary diligence, though it might form ground for

¹ Blyth v. Russell, Dec. 1822; Second Division.

² As to the effect of supervening insanity on mandate, with reference to third parties who are ignorant of it, *vide* the case of Pollok v. Paterson, 10th Dec. 1811, Fac. Coll.

an ordinary action, if the date of delivery (which would, in such case, be considered as the date of the bill) were ascertained *aliunde* by written evidence. But parole evidence of the date of delivery would probably be rejected, according to a rule of the law of Scotland, that nothing short of written evidence can constitute, either in whole or in part, an obligation for more than £.100 Scots. The admission of parole evidence in the case of subscription by initials, or by a mark, is no exception to this rule; because the law holds that such a subscription *on the bill* is equivalent to the party's full signature; and the only design of parole evidence is to establish what cannot be known *ex facie* of the bill,—that this kind of signature was truly and deliberately adhibited by him.

It does not appear that a bill or note dated on Sunday would be void. In Scotland, a distinction seems to have been taken between judicial and private acts performed on Sunday; it being held, that “acts of private parties on the Sabbath-day might stand legally valid;” but that “judicial acts, *auctoritate judicis*, are null¹.” The functions of Courts of Justice being suspended on Sunday by law, acts proceeding under their authority cannot be legally performed on that day. Diligence executed on Sunday is therefore null², excepting the execution of *meditatio fugæ* warrants, from the necessity of the case, and perhaps from the circumstance of their being in some measure criminal warrants³. On the other hand, there does not seem to be any law invalidating the secular acts of private individuals performed on Sunday. It has been therefore decided, that a bond executed on Sunday was not objectionable⁴; and the same rule is applicable to bills. In one case⁵, where a company who had accepted a bill on Sunday, pleaded this as an objection against an onerous indorsee, the objection was repelled by the Lord Ordinary, and the parties acquiesced in his judgment. The point does not seem to have been brought in any case before the Court. In England, likewise, the doctrine now stated

¹ *Oliphant v. Douglas*, 3d Feb. 1662, *Morr.* 15002. ² *Morr.* 15001-4.

³ *Kemp v. his Creditors*, 16th Jan. 1786, *Morr.* 8554.

⁴ *Duncan v. Bruce*, March 1684, *Morr.* 15003. *Vide* also *Bankt.* 4. 42. 3.

⁵ *M'Pherson and Co. v. Gray*, Summer Session 1824, before Lord Mackenzie.

appears to be recognised at common law; for, in some questions as to the validity of sales on Sunday¹, the party objecting relied chiefly on the application of certain English statutes to the case; and it has been more than once held that they were inapplicable. They have been found inapplicable to the acceptance of a bill, because the acceptance was not held to fall under the 16 Car. II. c. 7, unless it was within the party's ordinary calling. It was also held that the acceptance could not be presumed to have been made on Sunday, merely because the bill bore date on that day, but that, according to the usage of merchants, the contrary must be presumed².

When a bill is made payable a certain time after date, the date of drawing it will be held as the date contemplated³. On the other hand, when the bill is founded on as an assignation of the drawer's funds in the drawee's hands, the date of presentment regulates the assignation, as proved by acceptance, when the acceptance bears a precise date, or otherwise, by a protest, or other evidence of presentment, since the bill can only be considered from that date, as an intimated assignation⁴. This is the rule, (54 Geo. III. c. 137, § 13,)

¹ *Drury v. De la Fontaine*, 1 Taunt. 131; *Bloxome v. Williams*, 5 D. and R. 82. But *vide Fennell v. Ridler*, 8 D. and R. 204.

² *Begbie v. Levy*, 1 Cr. and Jerv. 180.

³ *Chitty*, 169; *De la Courtier v. Bellamy*, 2 Shower, 422; and *Hague v. French*, 3 Bos. and Pull. 173.

⁴ In *Gordon v. Anderson*, 9th Dec. 1712, *Morr.* 1490, which was an action by the payee of a bill against the drawee, who had refused to accept, the Court sustained the action in so far as the drawee had funds of the drawer in his hands at the date of the bill; holding that the draft was an assignation of the funds, and the protest for non-acceptance an intimation of it. The same rule has been followed in many other cases. In *Stewart v. Elliot*, 13th Feb. 1724, *Morr.* 1463, a draft made after the funds in the drawee's hands were turned into money, and a protest for non-acceptance, dated 5th July 1708, were preferred to a gift of escheat of the same funds, which past the seals in November 1708. In *Mitchell v. Mitchell*, 17th Nov. 1734, *Morr.* 1464, the holder of a draft intimated by protest was preferred to an arrestment in the drawee's hands, used after the protest by a creditor of the drawer; and in *Rob v. Chalmers*, Feb. 1737, *Morr.* 1465, *Elchies*, No. 14, *v. Bill*, a bill drawn on 30th July 1731, payable betwixt that date and Martinmas 1731, but protested for non-acceptance only on 6th May 1732, was postponed to a bill by the same party, drawn on 6th August 1731, payable at Whitsunday 1732, but protested for non-acceptance before the other bill, viz. on 7th August 1731. On the same principle, a protest for non-

in deciding whether the transference of funds by a draft on the holder falls within sixty days of the drawee's bankruptcy, and whether such a transference to the payee or indorsee of a bill is effectual to exclude an arrestment of the same funds in the drawer's hands. In a case where the acceptance of a bill bore no date distinct from that of drawing it, the Court, (in a question with a creditor claiming as drawer and payee of the bill, and who sought to reduce a disposition granted to some other creditors of the acceptor, as falling under the act 1696,) held, that the former could not be considered as a creditor at the date of drawing, and that the acceptance, which bore no date, could not be considered as of the same date with the drawing¹. But doubts have been expressed by a learned author², whether this decision would now be followed unless under peculiar circumstances; and an opposite decision has been since pronounced respecting an indorsation³, the Court "holding the presumption to be, that the "indorsation was of the date of the bill." The same presumption, indeed, was followed in a much earlier case with regard to the date of the indorsation of an inland bill⁴, in a competition betwixt the indorsee and an arrester, the date of the bill being prior to the arrestment, and the Court holding the indorsation to be of the same date with the bill. Even in a stronger case⁵, which was likewise a competition between the indorsee of a bill and an arrester, the Court not only held it to be presumable that the indorsation was of the same date with the bill, (which was prior to the arrestment,) but they found that this presumption could not be elided by the oath of party, that the arrestment was first, in respect it was not alleged that the indorsation was gratuitous, or that the indorsee knew of the arrestment when he took it. It may

acceptance of a draft was found equivalent to an intimated assignation, and was therefore preferred to subsequent arrestments by creditors of the drawer, in the cases of *Gavin v. Kippen and Co.*, 17th Nov. 1768, *Morr.* 1465; and *Spottiswood v. M'Niel*, 4th March 1778, *Morr. ibid.*

¹ *Mann v. Walls*, *Morr.* 1006, 1083, 1183, 1477.

² *Bell's Comm.* 185.

³ *Thistle Bank v. Leny*, 2 *Bell's Cases*, 14th May 1794.

⁴ *Colvil v. Ogilvie*, 15th July 1709, *Morr.* 1501.

⁵ *Smith v. Home*, 5th Dec. 1712, *Morr.* 1502-4.

be doubted, whether such a presumption, not being founded on positive written evidence, but merely on a constructive reference to the date of the bill, would now be held exclusive of contrary proof; but it would afford *prima facie* evidence. When a bill is drawn in one country and accepted in another, the distance betwixt the two countries will form a circumstance *ex facie* of the bill, to prove that there must have been an interval between the draft and the acceptance. If the precise date of the acceptance is not proved, it will probably be presumed to have been made within the shortest time, during which the bill might be transmitted from the one country to the other.

It has been decided in England¹, that, when a bill was dated seven days after the time of drawing it, and made payable sixty-five days after date, and when the payee, after indorsing it to a third party, died before the arrival of the date of drawing inserted in the bill, the bill was, notwithstanding, transferable, and was effectually transferred by the payee during the interval, so that the indorsee had a good action against the drawer. The date is not material in any case, except as regulating the term of payment; and, in this case, where the bill had been postdated with that view, the Court held that the term of payment must bear reference to the date in the bill, being thus as well ascertained as if it had been made seventy-two days after the actual date. It follows from this decision, that a bill or note postdated would be valid, though the drawer or maker should die before the arrival of the date inserted in it. Indeed, this power of postdating at common law appears to have been recognised by the statutory restrictions imposed on it, the particulars of which have been already explained, as also by an enactment in 17 Geo. III. c. 30, made perpetual by 27 Geo. III. c. 16, and confirmed by 7 Geo. IV. c. 6, § 4, (which, however, is applicable exclusively to England,) bearing that indorsements of bills, notes, checks or drafts for sums below £.5, shall bear date at or not “*before the time of making thereof, and not on any day subsequent thereto*.”

¹ *Pasmore v. North*, 13 East. 517.

² *Vide* Lord Ellenborough's opinion in *Pasmore v. North*, 13 East. 520.

4. Place where the bill or note is made.

It is said¹ to be proper for the maker of a bill or note to write on it the name of the place where it was made, and likewise, (if he is not well known,) to add his own residence, that the holder may find him out when necessary. But this is not indispensable. The insertion of the place of making appears to be required, in certain cases, in England², (but not in Scotland,) in bills and notes for sums below £.5. The same thing is required³ in Scotland as well as England, in checks upon bankers, in order to exempt them from the duties imposed on bills or notes.

5. The sum.

The sum must be written distinctly in the body of the instrument. It is usually expressed there in words; and it is common and advisable, though not indispensable⁴, to superscribe the sum also in figures. It is said⁵, that, if there be any discrepancy between the words and the figures, the former ought to be the rule, although the letter of advice should agree with the figures⁶. But, on the other hand, the sum marked on the margin may sometimes explain an ambiguity in the words inserted in the body of the bill or note⁷. In drawing a check on a banker, the sum is generally subscribed or superscribed. It has been held in England⁸ that a bill for "*Twenty-five*" seventeen shillings and threepence, may be declared on as for twenty-five *pounds* seventeen shillings and threepence. But such a bill could not be admitted, in Scotland, as a warrant for summary diligence. The words "*Sterling*," or any equivalent words, are held to mean English money or currency⁹.

¹ Chitty, 168.² 17 Geo. III. c. 30.³ 55 Geo. III. c. 184, Exemptions, v. Bill, § 4.⁴ Beawes, No. 3, v. Bills, 563, ed. 1813; Marius, 139.⁵ Marius, *ibid*.⁶ Forbes, 42.⁷ *Vide* Elliot's case, 2 East's P. C. 951, where, on an indictment for forging a note, which promised to pay on demand the sum of Fifty; "*£. fifty*," however, being written on the margin, the Judges, on a case reserved, held that the words "*£. fifty*" proved, beyond a doubt, that the word "*fifty*" in the body of the note had been intended for fifty pounds.⁸ Phipps v. Tanner, 5 C. and Pay. 488.⁹ *Lansdowne*, 2 Bligh, 87; *Kearney v. King*, 2 B. and Ald. 301.

If a person signs his name, as maker, drawer, acceptor, or indorser to a bill or note in which the sum is left blank, he is liable for whatever sum the holder chooses to fill up¹; and if he subscribes a blank bill stamp, he will be liable for the highest sum, (when filled up,) to which the stamp is applicable². In the same way, if any person subscribes a bill or note, where the sum is written in such a manner, or such blanks are left, as allow it to be altered to a larger sum, without giving the document that suspicious appearance which would attract the notice of a person exercising ordinary diligence, the subscriber will be liable to any *bona fide* holder for the increased sum³. The principle of this doctrine appears to be, that the parties to the bill or note, by drawing or subscribing it when in such a state as to enable the holder to alter the sum without risk of detection, have led third parties to believe, either that the increased sum was that inserted in the document at the time of drawing it, or that *the whole* sum was inserted afterwards, by virtue of an implied authority in a blank left for the purpose. With the actual authority given, third parties have nothing to do; they are concerned only with the obligation presumable *ex facie* of the bill, which the debtor has sanctioned by his signature. In the first of the cases now cited, the Court, adopting this doctrine, sustained, both against the acceptor and indorser to the full extent, a bill in which the sum had been altered from "*eight*" to "*eighty-four*" pounds, there being so much room for the alteration, that it was made without giving the bill a suspicious appearance. In the second case cited, there being two bills,

¹ This was decided in *Russell v. Langstaff*, *ante*, 62, note 7, with reference to promissory-notes; and in *Usher v. Dauncey*, *ante*, 63, note, with reference to bills. *Vide* also the opinion of Lord Ellenborough to the same effect in *Powell v. Duff*, 3 Campb. 182.

² In *Collis v. Emmett*, 1 H. Bl. 313, a person who had signed his name to a blank bill stamp was found liable for £.1551, the sum filled up, without any objection on this ground, though another point was the subject of much discussion. The same point is likewise said to have occurred in *Little and Co. v. Muir*, 23d Feb. 1803, Bell's Comment. i. 390, note 5.

³ *Vide* Pothier, c. 4, § 99-101, who discusses this matter very fully; also *Pagan v. Wylie*, 19th June 1793, Morr. 1660; *Graham v. Gillespies and Co.*, Jan. 1795, Morr. 1453. A similar point was decided on the same grounds, by the Court of Common Pleas, in *Young v. Grote*, 4 Bingh. 253.

one in which the words “four hundred and” had been added before “fifty-eight,” without appearing suspicious, and the other, in which an alteration had likewise been made in the sum, but so as to have a crowded appearance, the Court sustained the first bill against the acceptors to the full amount, in a question with an onerous holder, but found the other bill at first, good only for the original sum, and, on a reclaiming petition, suspended the charge on it altogether.

If the sum in a banker's check has been altered without the drawer's fault, but with such dexterity that the alteration may escape the notice of a third party, a banker paying the amount as altered will have no claim against the drawer except for the original sum, seeing it was only *for this sum* that he gave an order, and interposed his obligation¹.

The sum to be paid may be in the money of any country. It must be precisely fixed. Thus², a note having been granted promising to pay £.65, with interest, “with all other sums that may be due to him, (the payee,) Lord Ellenborough held, that the instrument was too indefinite to be considered as a promissory-note; it contained a promise to pay interest for a sum not specified, and no otherwise ascertained than by a reference to the defendant's books; and that, since the whole constituted one entire promise, it could not be divided into parts.” His Lordship, therefore, refused to sustain it as a note, even for £.65. In an English court of equity, and in Scotland, where our Supreme Court decides both on the principles of law and of equity, the bill would probably have been sustained to the extent of £.65.

6. Term of payment.

There is no reason to think that bills or notes must, in this country, (as they did in France by a special ordinance³), contain a precise term of payment. If no term is specified, they are considered in England⁴, and would probably be con-

¹ In *Hall v. Fuller*, 5 B. and C. 750, Chitty, 287, this precise point was decided. *Vide* also Pothier, *Contrat de Change*, § 99-103.

² *Smith v. Nightingale*, 2 Stark. 375.

³ *Vide* Pothier, No. 32.

⁴ *Chitty*, 170, *Whitlock v. Underwood*; 3 D. and R. 356; 2 B. and C. 157.

sidered here, as payable on demand, as checks on bankers always are, though they do not specify a term of payment¹. It is advisable, however, to specify the term of payment; and this ought to be done in words, as less subject to alteration than figures. It is said to be sometimes the practice², when a bill, payable a certain time after date, is drawn in a country using one style, and payable in a country using another, to insert the date both according to the old and new style.

Parties may agree on any term of payment they choose, subject, however, to the restrictions already explained. Bills, whether foreign or inland, may be made payable at a certain specified date, or at sight, or on demand, or a certain time after sight, or after date. Foreign bills are generally drawn payable at one or more usances, (usance being the term of payment usually allowed between the two places with reference to which the bill is drawn,) but they may be also made payable in any of the forms above specified. Bills are more frequently drawn payable at sight than on demand. A foreign bill drawn payable at sight will be payable according to the course of exchange at the time when it is presented to the drawee, unless it bears expressly to be payable according to the course of exchange at the time of making it³. In the case of a promissory-note for money lent⁴, when interest at a certain rate was made payable to the date of acceptance, this was interpreted to mean *till sight*.

The rules which determine the time when bills or notes become due shall be afterwards considered.

7. Place of payment.

It is not indispensable to specify the place of payment in a bill or note. Beawes⁵ observes, that the place of payment, as well as the drawee's residence, must be specified in the superscription or body of a bill. But the former is not now

¹ *Boehm v. Stirling*, 7 T. R. 423-30; *Down v. Halling*, 4 B. and Cr. 330; 6 D. and R. 455.

² *Kyd and Marius*, 91; *Chitty*, 170.

³ *Pothier*, No. 174. The rule, as laid down by this author, was established in France by a special enactment; but it appears, besides, to be founded on general principles.

⁴ *Sutton v. Toomer*, 7 B. and Cr. 416.

⁵ No. 3, on Bills of Exchange.

considered essential, although the drawee's place of residence is generally set forth in the address to him. It may, however, be presented to him, either at his residence, or personally anywhere¹. The effect of a specification of the place of payment in a bill or note, or in a memorandum to the bill or note, or annexed to the acceptance of the bill, (the last of which points has been the subject of much controversy in England,) shall be afterwards particularly considered.

8. Request to pay.

A bill, (differing in this respect from a promissory-note,) is a request by the drawer to the drawee to make payment. The request to pay must be made as a matter of right². It is said³, that the direction to pay the money need not be in the body of the bill, or even on the same side of the paper. But this doctrine appears to be founded on a misapprehension of a passage in Marius⁴, which relates only to the *address*, or, as he calls it, the *direction* to the drawee. In Scotland, the direction to pay must be in the body of the bill, because otherwise the subscription of drawer or acceptor would not necessarily refer to it; and there seems to be no good reason for holding that the rule is different in any other country.

In a case⁵ where there was a *promise* to pay, signed and indorsed by one party, and also an address to a third party, who subscribed his name across the body of the document, it was held, in a question with the party who first subscribed it, to be a promissory-note, and farther, that, though its character had been ambiguous, it must be construed most unfavourably for the person who issued it, and that he was not entitled, as drawer and indorser, to plead want of negociation.

In inland bills, the request to pay is absolute, and likewise in foreign bills, with a single exception. This exception arises from the circumstance, that foreign bills generally con-

¹ *Vide post*, on Presentment.

² *Little v. Stackford*, 1 M. and Malk. 171.

³ Chitty, 175, and Argument in *Brown v. Harraden*, 4 T. R. 149.

⁴ Page 44.

⁵ *Edis v. Bury*, 6 B. and C. 433; *vide also* *Block v. Bell*, 2 M. and Malk. 149, *ante*, 6.

sist of several parts or copies, (in all composing what is called a set,) in order that, although one should be lost, the bearer may recover payment on the other. *Each part* ought to contain a condition, that it is to be payable only if the other parts should remain unpaid ¹. For, if a person should omit this condition in the first part, and insert it in the second only with reference to the first, and only in the third with reference to the preceding two, (which is the plan recommended by several writers,) he might perhaps be obliged to pay each; since it would be no defence against a *bona fide* holder of the second that he had paid the third, or of the first that he had paid either of the others ². It has been said ³, however, that, if any of the parts has been omitted in the enumeration through an evident mistake,—for instance, if a bill should run thus, “Pay this my first bill of exchange, *second* and *fourth* not “paid,” the mistake will be corrected by supplying the *third* part. It has been decided ⁴, that, although a person who gets one of the parts of a bill into his hands, should recover payment from the debtor by forging an indorsement from the payee to himself, the real payee is, notwithstanding, entitled to recover on the other part. But ⁵ when the drawee’s bankers, at whose house a bill was made payable, paid it on a forged acceptance, the Court of Common Pleas decided, that they could not recover back the sum paid, because they had been guilty of negligence, in paying without being certain of their constituent’s signature, and had thereby prevented the payee from having recourse on the other parties to the bill, till it was too late.

It has been decided ⁶, that, when the drawee, (who was also a member of the company that was payee,) of a foreign bill, in-

¹ Bayley, 28.

² This principle was recognised in an appeal from the Court of Session, *Davidson v. Robertson*, 3 Dow, 319, where the House of Lords decided, that, if two bills, (though relating to the same transaction,) were made payable absolutely, without reference to each other, and got into the hands of separate one-rous holders, an action was competent on each against all the several obligants.

³ Bayley, 29.

⁴ *Cheap v. Harley and Drummond*, 2 Camp. 18, cited 3 T. R. 127.

⁵ *Smith v. Mercer*, 6 Taunt. 76.

⁶ *Holdsworth v. Hunter*, 10 B. and Cr. 449; *vide Chitty*, p. 176, quoting from *Pardessus*, 443.

dorsed one part as a security to a third person, and afterwards accepted another part, and indorsed it to a different person, but the part first indorsed was restored, on a different security being substituted for it, the indorser of the other part had a good action on it against the drawee. It was held, 1st, That the indorsement of the first bill was conditional, and that the condition had ceased; and, 2^d, Some of the Judges held that the drawee was prevented from disputing his liability for the second bill, by having accepted it.

When a bill is drawn on more than one person, the words "conjunctly and severally" are, in general, coupled with the request to pay, so as to make it certain that each drawee shall be liable for the full amount. But the same obligation exists, though no such words should be used¹, or though the word conjunctly should be alone used², or though one of the parties should accept only as cautioner³, without any address to him⁴, or though the bill should be addressed to him "as security, jointly and severally⁵," it being held, that the insertion of words importing a cautionary obligation is meant only to settle the question of relief between the acceptors, and cannot limit the direct claim which the holder of a bill has, from the nature of the document, against every acceptor⁶. The word "cautioner" appears, in one case⁷, to have received the same

¹ In *Gordon v. Sutherland*, 20th Jan. 1761, *Morr.* 14677, the addition of these words, *ex post facto*, was held to be immaterial, in respect that each drawee was liable for the full amount of the bill, though such words had not been inserted. The same point had been decided in the earlier cases of *Macmorland v. Maxwell*, 19th Jan. 1675, *Morr.* 14673; (*vide* the Reports of Gosford, Stair and Dirleton, the two last of which may be easily reconciled with the first, though apparently different); *Rutherford and Sangster v. Donaldson*, 18th Feb. 1708, *Morr.* 14675, and *A v. B.*, 10th Dec. 1724, *Morr.* *ib.* where the Court is said to have given the same opinion on a question from Lord Cowper.

² In *Mackellar v. Campbell*, 7th June 1811, *F. C.*, it was decided, in a question between the holder and two acceptors of a bill, that the word "conjunctly" added to their acceptance, bound them as much as the words "conjunctly and severally."

³ *Gibson v. Campbell*, 12th Nov. 1753, *F. C.*; *Elchies, v. Bill*, No. 54.

⁴ *Macdougall v. Foyer*, *F. C.* 13th Feb. 1810.

⁵ *Sharp v. Hervey and others*, 24th June 1806; *Morr.* App. v. Bill, 28.

⁶ *Vide* Opinion of the Court in *Mackellar v. Campbell*, *supra*, note 2.

⁷ *Hills v. Scott and Wilson*, 17th June 1742, *Morr.* 14675, *Elchies, v. Bill*, No. 26.

effect between the parties themselves, in another view ; it being decided, where a bill had been drawn upon and accepted by one person as principal, and by three others as cautioners, that the latter, on the bill being indorsed to them, were entitled to recover its full amount from the principal debtor as much as any other holder. The rule of liability to the holder is also applicable to joint obligants in a promissory-note, each of whom will be held liable separately to the creditor for its full amount, although one of them should subscribe only as cautioner. In England, in a case where the creditor in a note appears to have been a party to the cautionary engagement, (though not appearing *ex facie* of the note,) the cautioner has been held to be discharged by the creditor giving up his claim against the principal, on payment of a composition¹. With regard to cautionary obligations, as appearing on the face of bills or notes, the Court, in an early case², on the report of Lord Kilkerran, expressed an opinion, consistent, perhaps, with strict principle, viz. that, as cautionry was inconsistent with the nature of bills, the bill should be held altogether null as to the cautioner. But the matter appears to be settled by the decisions already cited.

As a bill is a request to a third person, his address ought to be written on it. According to Marius³, this address is written, in some countries, on the back of the bill ; but the general form in this country, and that which this author recommends, is to write it under the bill on the left hand. The want of an address may be supplied by acceptance, which is held to imply that the acceptor is the party for whom the bill was intended⁴. It is said by Marius⁵, that, if a bill is sent

¹ Garret v. Jull, Selwyn, 5th ed. 394 ; also in Hall v. Wilcox, 2 M. and Malk. But *vide* Fentum v. Pocock and other cases *post*, where this matter shall be more fully considered.

² Gillespie v. Barr, 15th Jan. 1736 ; Clerk Home and Elchies.

³ 44.

⁴ Grierson v. the Earl of Sutherland, Morr. 1447. The same point has been decided in England in the case of Gray v. Milner, 3 Moore, 90, where the place of payment merely was specified in the usual place of the address, and the words " accepted, Charles Milner," were written across the body of the bill.

⁵ 142-3 ; *vide* also Beawes, No. 195.

to the payee, or to a friend of the drawer in this country, without the drawee's address, but with a letter of advice, specifying the drawee, it must be presented to him, and protested, in case of non-acceptance, in order to preserve recourse against the drawer. And the same author observes, that, if the intended drawee has a letter of advice from the drawer, and would have been bound to accept the bill had it been properly addressed, he may accept without an address. In such circumstances, he would probably be liable to the drawer for the loss arising through his non-acceptance. Forbes, indeed, expresses an opinion¹, that the drawee, in such a case, cannot safely accept, unless for the honour of the drawer; but his reasons for this opinion do not appear to be satisfactory. It has been held², that, when a bill was addressed to A as drawee, or, in his absence, to B, and A only accepted, an action was good against A upon his acceptance, without noticing B. On the other hand, when a bill was addressed to one person only, and another person accepted along with him, it has been decided in England³, that there could be no action against the last of these persons as acceptor, it being held contrary to the custom of merchants that there should be a series of acceptors. But this doctrine appears to be contrary to that of a case already cited⁴, where a person, having subscribed a bill "as cautioner," along with two other parties, although it had not been addressed to him, was found liable, with the other acceptors, for its full amount. It may perhaps be questioned, whether this last decision was consistent with the stamp-acts, seeing that the addition of a new obligant seems to create a different obligation, which requires a new stamp⁵.

Bills are sometimes drawn payable as *per* advice, in which case the drawee cannot safely accept or pay till he receives a letter of advice, and finds that it tallies with the directions

¹ 37.

² 12 Mod. R. Anonym. *per* Holt, C. J.

³ *Jackson v. Hudson*, 2 Camp. 447, *per* Lord Ellenborough; *vide* also Forbes, 76.

⁴ 75, note 4.

⁵ *Vide* the opinion expressed by Bayley, J. in *Clark v. Blackstock*, *post*; and remarks on the case of *M. Ara v. Watson*, *post*.

in the bill¹. In a case of this kind referred to by Forbes², of a bill drawn "as *per* advice," a forthcoming being pursued against the acceptor, on an arrestment used in his hands by a creditor of the drawer's brother, (for whom the drawer had deponed that he held the bill in trust,) and the acceptor alleging in defence, that the drawer had induced him, by false representations, and before receiving any letter of advice, to accept the bill for behoof of his brother, who, by that time, had failed and fled, the Court ordered all parties to make production of any letter of advice or other documents regarding the transaction; and appointed the drawer also to depone (as a witness,) as to any communing that took place concerning the transaction. Here a proof was allowed, partly by production of writings, and partly by parole evidence, because there was an allegation of fraud, supported in part by the terms of the bill, which was drawn "as *per* advice." On the other hand, if the bill contains the words "without farther advice," or if, (as is now more usual,) it says nothing on the subject, it is a sufficient authority in itself to the drawee to accept and pay. It has been said, on the authority of Scaccia³, that, if the drawee should pay a bill drawn as *per* advice, *supra* protest, for the honour of the drawer, before receiving the letter of advice, he will have a good claim against the drawer. But the passage cited relates only to the ordinary claim of a drawee who accepts *supra* protest; whereas the case of a bill drawn "as *per* advice" appears to form an exception to the common rule, since the drawer thereby requests that the drawee may not accept till the letter of advice arrives. If he accepts, in such a case, either *supra* protest, or simply, he does so at his own risk, seeing it is contrary to the drawer's orders.

9. Direction to place the sum to account.

This is now seldom used in bills. It is said⁴, that when the drawer is to be himself the debtor, he adds to the request to pay, the words, "and place it to my account;" that when the drawee is his debtor, he uses the words, "and put it to

¹ Chitty, 185; Malyne's Lex Mercat. part 3, c. 6, obs. 8.

² Cowan v. Douglas, 14th Nov. 1701, Morr. 1480; Forbes, 54.

³ Scaccia, 2 Gloss. 5, No. 358.

⁴ Marius, 27.

“ your account ;” and that, when a third person is debtor to the drawer, these words are used, “ put it to the account of “ such an one.” But none of these words are necessary to the validity of the bill. This has been decided in a recent case, where parties who had engaged to accept bills for the plaintiff, were found not entitled to refuse acceptance, because he had not specified to which of two accounts they should be placed, it being held, in such a case, that they might place the bills to either of the accounts they chose ¹. It shall be afterwards considered under what circumstances the drawer, and under what circumstances the acceptor, (in settling accounts between themselves,) is to be considered as debtor for the amount of the bill.

10. Name of payee.

No bill or note is complete, unless the payee be pointed out, either by name or by description, as by these words, “ Pay to the bearer.” Though his name only, without designation, should be given, his possession of the bill will supply that deficiency ². It has been decided ³, that a note payable to one person or to another, cannot be sued on as a promissory-note, in respect that the promise is conditional, which, as already shewn, is inconsistent with the nature of bills or notes. A learned French author ⁴ suggests, that, if a bill, though it does not specify the payee, mentions value received of a particular “ person,” that person should be presumed to be the payee. The present law of France, however, appears to be different ⁵; and it is probably better that parties should suffer for their negligence in granting or taking such an imperfect document, than that a conjectural construction of it should be hazarded. There does not appear to have been any case on the subject in this country or in England.

A bill or note left blank in the payee's name is not complete till the blank is filled up ⁶, though, in England, any

¹ Laing v. Barclay, 1 B. and Cr. 398.

² Ersk. iii. 2. 26.

³ Blackenhagen v. Blundell, 2 B. and A. 417.

⁴ Pothier, No. 31.

⁵ Pardessus des Lettres de Change, No. 89.

⁶ Rex v. Randall, Bayley, 37, note 76, where a person having been convicted of forging a bill of exchange, payable to _____, the Twelve

person who appears *aliunde* to be in right of the document may sue for its amount. After such a bill or note has been made and issued, it has been decided in England, that any *bona fide* holder may fill up his own name as payee¹. It was indeed held, in an action on the same bill as in the case last cited², that such an indorsee could have no claim against the drawee, unless he proved that he had authority from the drawer to fill up his name as payee. But the drawee had not accepted, and the action against him was, therefore, founded entirely on the ground that the drawer had authorised him to accept. The evidence of this was a letter written by the drawee, (but without an address when produced,) after refusing to accept, wherein he mentioned, that he had seen the drawer about a bill, not described in the letter as that in question, though bearing to be one for the same sum, and was now ready, in consequence of his explanation, to accept it. The Court (of Common Pleas,) therefore, held it necessary for the plaintiff to prove that he had authority to insert his own name in the bill in question as payee, for this reason *inter alia*, that the drawee would otherwise have no claim against the drawer, who might say, "that *this was not the instrument* which he delivered to the person from whom the plaintiff received it," and to which alone the communing mentioned in the letter had referred. The plaintiff afterwards brought what was held sufficient proof of his authority³. The point here was, whether this letter binding the drawee to accept referred to the bill in question, as, if it did not, he was under no obligation to accept the bill. But he might, notwithstanding, have been authorised and entitled to accept it if it had been presented to him without any information except the drawer's signature, (though with the payee's name filled up *ex post facto* by the holder,) be-

Judges, on the ground stated in the text, recommended an application for pardon. *Vide* also *Rex v. Richards, Russ. and Ry. c. c. 193.*

¹ *Cruchley v. Clarence*, 2 M. and S. 90. In an action by such an indorser against the drawer, it was held, that "the issuing the bill in blank without the name of the payee, was an authority to a *bona fide* holder to insert the name." *Per Bayley, J.* The opinions given by the other Judges are to the same effect.

² *Cruchley v. Mann*, 1 Marsh, 31; 5 Taunt. 529.

³ Same case, 5 Taunt. 529.

cause he might then have held, that the drawer's signature was a mandate to accept the bill as he had drawn it, payable to any person whose name the holder might choose to insert. It would appear that the drawer, by signing a bill blank in the payee's name, creates a presumption, as he would do by indorsing it blank, that any person who fills up the blank with his own name, does so by his implied authority. Indeed, it has been already shewn¹, that a person, by subscribing a blank bill stamp, becomes liable for any obligation, (conformable with the amount of the stamp,) which is afterwards filled up in it. A proof of fraud in filling up the payee's name would be relevant². But, 1st, This could be pleaded only against the party guilty of it, not against his onerous indorsee; and, 2^{dly}, Even in a question with the person who filled up the payee's name, it must be presumed, unless the contrary be proved, that he was authorised to fill it up.

It is said³, that, in England, if a payee's name be wrong spelled, parole evidence will be received to shew who was intended; and reference is made to a case, where such evidence was admitted, to prove that "Elizabeth Willison," the name inserted as payee, meant "Elizabeth Willis." Such a proof might be admitted here also, in an ordinary action; but the bill or note could not be the ground of summary diligence at the instance of the *intended* payee, or of any person to whom she might indorse it by her proper name. In a case⁴, where a person called Henry Davis was payee, and another person of the same name indorsed the bill for value to the plaintiff, the Court of King's Bench held it competent to prove this fraud even against the plaintiff; their opinion being, that the indorser had committed a forgery, and that the plaintiff could not derive a title through forgery. Such a bill, being unexceptionable *ex facie*, would afford a good warrant in Scotland to a *bona fide* holder for summary diligence. But the facts now stated would be sufficient to suspend the diligence, there being the same want of title in the indorser, on whose right that of the holder depends, as if he had im-

¹ *Ante* 70.

² *Vide* Andrew v. Buick and Co. 1 Shaw, 78.

³ Chitty, 178.

⁴ Mead v. Young, 4 T. R. 28; Ashurst, Buller and Grose, J. v. Lord Kenyon, C. J.

petrated a bill to himself by force. Where both father and son have the same name, a bill or note taken payable in that name will be presumed, unless the contrary appear, to be meant for the father¹. It is sufficient that the bill or note affords means for ascertaining who was intended as payee, though the description given of him be not quite accurate².

A bill or note may be made payable to the bearer³, and, in that case, it is transferable by delivery. If it be made payable to "ship Fortune, or bearer," or if any other name plainly fictitious be prefixed⁴, the bill or note will be considered as payable to the bearer, and the fictitious name will go for nothing. In France, bills payable to bearer, though at one time allowed⁵, are now prohibited⁶. In Scotland, it was at one time decided⁷, that a bill payable to the bearer was not obligatory. But it has been already shewn, that the act 1696, against blank writs, under which this judgment was pronounced, is held now to be inapplicable to bills.

It was long disputed in England, whether the onerous indorsee of a bill drawn payable to a fictitious person "or order," and indorsed in name of this fictitious person by the party so drawing it, was entitled to recover on it as a valid bill. It was not held that the indorsement could be effectual as such, because it was a forgery; there being no such party as the pretended indorser. But it was said, that in an action

¹ In *Sweeting v. Fowler and another*, 1 Stark. 106, Henry Sweeting, the son, having sued upon a note made payable generally to "Henry Sweeting," Bayley, J. held, that the father, whose name also was "Henry Sweeting," must be presumed to be meant. But, it being proved that the son held the bill, and had given instructions to bring the action, these facts were accounted sufficient to obviate the presumption. As the bill afforded no evidence that there was such a person as the father, the son, being creditor *ex facie* of it, would, in Scotland, have been entitled to summary diligence; and, if a suspension had been brought on the ground that the father was meant, the facts now stated would probably have been held sufficient to prove the contrary.

² In *Rex v. Box*, 6 Taunt. 325, a person being convicted of forging a note payable to two ladies, described therein as stewardesses of a certain society; and it being stated, in arrest of judgment, that they had no legal right to that character, the Twelve Judges, notwithstanding, held that this was a promissory note, and that consequently the conviction was good, seeing that the payees were generally known by the description therein given to them.

³ *Grant v. Vaughan*, 3 Burr. 1516.

⁴ *Ibid.*

⁵ Pothier, No. 224.

⁶ Pardessus, No. 69, p. 82.

⁷ *Walkinshaw's Exec. v. Campbell*, *ante*, 52, note 3.

against the parties privy to the fraud, an onerous indorsee was entitled to sue on the bill as payable "to the bearer." This was decided in a question with the acceptor, in four different cases¹; and the same decision was given in an action against the drawer², on the ground, that, by signing a blank bill stamp, he had empowered the holders to fill it up in what manner they pleased, and had thus given currency to the bill in question, which was filled up in the manner now stated. The case was afterwards brought under review of the House of Lords by a writ of error³, when their Lordships, after taking the opinions of the Twelve Judges, decided, in an action by an onerous indorsee against the acceptor, (he being privy to the fraud at the time of his acceptance,) that the bill was to be construed as payable "to the bearer." The same principle was followed by the House of Lords in another case⁴, (which was likewise an action brought against the acceptor of such a bill,) on similar grounds to those now stated. It would appear, from a subsequent case⁵, that Lord Ellenborough's opinion was not very favourable to the judgment of the House of Lords. In that case, which was an action by the onerous indorsee against the acceptor of a bill made payable to a person described as fictitious, "or his order," but without stating that the defendant knew this circumstance at the time of accepting, Lord Ellenborough non-suited the plaintiff, holding that the bill could not be construed as payable to the bearer, and that the plain-

¹ *Vere v. Lewis*, 3 T. R. 1821; *Stone v. Freeland*, 1 H. Bl. 316, note. In the last case, however, though Lord Mansfield expressed an opinion to the effect now mentioned, the decision proceeded on a promise of payment by the defendant. *Tatlock v. Harris*, 3 T. R. 182; *Minet v. Gibson*, 3 T. R. 481. In these two cases, the acceptors were held liable under the count for money had and received, as they were considered to have received the amount of the bill for behoof of any party who might become the holder. In the case of *Vere v. Lewis*, the majority of the Court likewise held, that the plaintiff might recover as on a "bill payable to bearer."

² *Collis v. Emmett*, 1 H. Bl. 313.

³ *Gibson v. Minet*, 1 H. Bl. 569. Lord Chancellor Thurlow against the judgment of the Court below; Lords Loughborough, Bathurst, and Kenyon, for it. Eyre, C. B. and Heath, J. gave their opinions against the judgment, which was affirmed.

⁴ *Gibson and Johnston v. Hunter*, 2 H. Bl. 187.

⁵ *Bennett v. Farnell*, 1 Campb. 130, and Addenda, p. 180, No. 9.

tiff could not claim under the order of the alleged payee, seeing there was no such person¹. A rule *nisi* for a new trial was refused, because no evidence had been offered to shew, that the acceptor knew, at the time of his acceptance, that the payee was fictitious. Lord Ellenborough stated, that, if there had been such proof, he would have directed for the plaintiff, under the authority of the previous cases, by which, he said, that he conceived himself bound, "though by no "means disposed to give them any extension."

In Scotland, it is doubtful, whether even an onerous indorsee would be entitled, under any circumstances, to claim on such a bill. It does not appear to have been held in England, that an indorsee could claim on it under all circumstances, and against all the parties, as on a bill payable to the bearer. This was only a construction adopted against the acceptor or drawer, when they were supposed to be implicated in the fraud, in order to secure redress *against them* for the onerous holder whom they had deceived. Lord Ellenborough, in the case last cited, considers the previous decisions as limited to that special ground; and accordingly he held that, except in such a case, a bill, payable to a fictitious person or order, could afford no action to an indorsee, since there was no payee who could validly indorse it to him. But this objection, as it amounts to a want of title in the indorsee, is equally applicable in all cases, whether the acceptor or drawer has been privy to the fraud or not, it being impossible that their fraud, though it may subject them in damages to the party injured by it, should give that party a title which he has not by the bill. The same objection applies against construing the words, "payable to a certain (fictitious) person or order," as "payable to bearer;" for, if this is the proper construction, it must give the holder a claim as "bearer" against every previous party to the bill, which it is not alleged that it does. In Scotland, it would entitle the holder, as "bearer" of the bill, to use summary diligence against all the parties to it. The evident danger of allowing this, on such a forced construc-

¹ Reference was made, in the argument for the defendant, to another case, *Weare v. Taylor*, 1805, wherein Lord Ellenborough is said to have expressed a similar opinion, and to have also stated that the previous cases had been very much doubted.

tion, affords strong ground for holding that it cannot be the true construction. The fraud of the acceptor or drawer may give the indorsee a claim of indemnity against them, (as has been found in England¹, in a question between the indorsee of such a bill and the indorser,) and in such a claim the bill will form an important article of evidence. But the indorsee would not probably be held in Scotland to have a good title *under the bill*, except against the indorser, as drawer of a new bill². The question, however, has not yet occurred in Scotland.

It has been doubted³ whether the signing or indorsing a bill or note in name of a fictitious person would amount to forgery, though the English Judges have decided that it does⁴.

A bill may be taken payable to the drawer himself⁵, as well as to a third party. It may also be taken payable to one person for behoof of another⁶.

11. Payable to order.

A bill or note, unless when made payable to the bearer, is generally taken to the payee, "or order." In Scotland, it has been long settled⁷, that the words "or order" are not necessary, and that a bill or note may be effectually indorsed without them, by the payee. In England, it has been held that the indorsation of a bill or note wanting these words does not give the indorsee a good claim against any of the previous parties to the document, excepting his own immediate indor-

¹ *Ex parte* Clark, 3; Bro. Parl. Cas. 238; *Ex parte* Allen Cooke's Bank Law, 193, 8th edit.

² *Vide* note 1.

³ Hume on Crimes, vol. i. p. 138.

⁴ *Rex v. Toft*, 1 Leach, C. L. 172.

⁵ *Per* Holt, C. J. in *Butler v. Cripps*, 1 Salk. 130; — *v. Ormston*, 10 Mod. 186. In this case, it was decided, that a person was himself entitled to maintain action on a bill drawn payable to "his own order," it being held that there was no difference between a man having the power to dispose of money, and having the money to himself.

⁶ *Evans v. Cramlington*, Carth. 5. In *Smith v. Kendal*, 6 T. R. 123, a promissory-note was sustained, which had been taken payable to one person, in trust for another. In *Marchington v. Vernon*, 1 Bos. and Pull. 101, note c, action was sustained at the instance of the holder of a bill against the drawer's assignees, by virtue of a promise which they had made to the drawer to accept the bill, on the ground that he had a right to enforce this promise, seeing that it was made for his behoof.

⁷ *Crichton v. Gibson*, Jan. 1726, Morr. 1446.

ser¹. But such a document has been decided to be a good bill or note in the hands of the original payee, seeing he has a claim upon it independently of the right of indorsing it². A bill or note payable to "the order of" a certain person, has been held³ to give him a good right to sue upon it, as well as to indorse it.

12. "For value received."

Though bills or notes generally bear to be granted "for value received," it is now settled that these words are not necessary, either in granting or indorsing them⁴. In England, the same rule is established⁵, although it is advisable there to insert the words "value received" in inland bills or notes, as this is necessary, by statute, to enable the holder of them to recover damages from the drawer or acceptor, in case of non-acceptance or non-payment⁶. It has been held in England, that the words "value received" in a bill made payable to a third party, or in a note⁷, naturally imply that the payee has given value to the drawer⁸, and that, in a bill made payable to the drawer himself, they imply that he has previously given value to the drawee⁹.

In Scotland, where the insertion of these words is not necessary, the holder of a bill or note, whether he is payee or

¹ 1 Salk. 133, *per* Holt, C. J.

² *Burchell v. Slocock*, Lord Raym. 1545; *Smith v. Kendall*, 6 T. R. 123.

³ — *v. Ormston*, 10 Mod. 186; *Moore v. Paine*, Hardw. Cas. 288; *Frederick v. Cotton*, 2 Show. 8; *Fisher v. Pomfret*, 12 Mod. 125, *Carthew*, 403; *Smith v. Maclure*, 5 East. 476.

⁴ *Scott v. Laing*, 19th March 1707, *Morr.* 1535; *Swinton v. Thom's Representatives*, 26th Jan. 1709, *Morr.* 1536; *Ker v. Brown*, 22d July 1715, *Morr.* 1539; *Macdowal v. Duke of Douglas*, June 1731, *Morr.* 1541; *Forbes on Bills*, 49, and two cases (*Mickieson v. Graham*, and *Fairbairn v. Goodsir*,) therein cited. The same thing was held with regard to indorsation, in the case of *Auchinleck v. Millar*, 15th Feb. 1715, *Morr.* 1537, where an indorsation without the words "value received," was preferred to a back-bond granted by the drawer and payee to the acceptor.

⁵ *Vide* argument in *Shower*, 482; *Macleod v. Snee*, 2 Lord Raym. 1545; *per* Lord Ellenborough in *Grant v. Da Costa*, 3 M. and S. 351; *White v. Ledwich*, cited in a note to *Bayley*, 40.

⁶ *Vide* 9 and 10 W. III. c. 17, as amended by 3 and 4 Anne, c. 9, § 4, 5, 6.

⁷ *Clayton v. Gosling*, 5. B. and Cr. 362; 8. D. and R. 110.

⁸ *Grant v. Da Costa*, note 5, *supra*.

⁹ *Highmore v. Primrose*, 5 M. and S. 65.

indorsee, is generally presumed to have given value, unless the contrary is proved by his writ or oath, and this will be held whether the words "value received" have been inserted or not¹. In some old cases, this rule was not very strictly enforced², but it is now fully established. It has not been found applicable to documents not entitled to the privileges of bills, c. 9, to salt bills³, or precepts for delivery of grain⁴. But such privileges, such as that of indorsability, have been found to belong to treasury debentures, both from the special custom regarding such documents, and because they are made payable to order⁵. Indorsation also, though not bearing to be for value, is presumed to have been made for value paid by the indorsee⁶.

But this doctrine, whether relating to the payee or indorsee of bills or notes, is not to be taken without limitation. For instance, in the case⁷ of a person indebted to another in two liquid bonds, (for £. 100 and £. 253, 10s.,) who drew a bill on a third party in favour of his creditor, but without using the words "for value received," the Court, in an action by the creditor for payment of the bonds, decided that the bill must be imputed in part payment of them, unless he proved, by the debtor's oath, "that the bill was granted for another cause." It was admitted in argument, that value must be presumed to have been instantly paid for the bill, either if it had borne the words "for value received," or, without these words, if there had been no transaction except this bill between the parties. But, when there were bonds due by the drawer of the bill to the creditor, it was maintained that the presumption of present value ceased, as the words "for value received" were not inserted. This was found between the drawer and

¹ *Scott v. Laing*, 19th March 1707, *Morr.* 1535; *Jaffray v. Robertson*, 2d Jan. 1712, *Morr.* 12337; *Swinton v. Thom's Representatives*, 28th Jan. 1709, *Morr.* 1536; *Ker v. Brown*, 22d July 1715, *Morr.* 1539; *Haliburton and Ker v. Lord March*, 16th Feb. 1725, 5 Br. Suppl. 156.

² *Plumber v. Houston*, 13th Feb. 1706, *Morr.* 1496.

³ *Arbuthnot v. Pyper*, 17th June 1714, *Morr.* 1505.

⁴ *Merchiston v. Robertson*, 9th Feb. 1672, *Morr.* 1534.

⁵ *Castlehill v. Watson*, 17th July 1760, *Morr.* 1475.

⁶ *Auchinleck v. Millar*, 15th Feb. 1715, *Morr.* 1537; *vide also Patison v. Campbell*, 17th Jan. 1827, 5 S. and D. 208.

⁷ *Cheap v. Arnot*, 18th July 1712, *Morr.* 1537.

the original payee; but it could not probably have been so held against an indorsee¹. In another case, where a merchant in this country drew and indorsed bills payable to his correspondent abroad, "for value in account," the Court decided², between the drawer of these bills and a creditor of the payee attaching them, that the former was preferable *with regard to them*, except in so far as it was proved that the payee stood creditor to the drawer or indorser, either by the payment or acceptance of counter-bills. This question occurred with a personal creditor, who might probably be held subject to the same exceptions with the original payee. But the argument against him was, that the words "value in account," by shewing that the payee was accountable for them to the drawer, rendered the latter *still proprietor of them*; and this limitation, if well founded, must have followed them even into the hands of an onerous indorsee. It seems farther to be implied in the words of the judgment, that the bills in question were as effectually accounted for by the acceptance of counter-drafts from the original owner of these bills, as if such drafts had been paid. These acceptances would probably have formed a *novatio debiti*, being a substitution of them with the creditor's consent, for the acceptor's general obligation of accounting under the former bills³.

It was once held, that, in a question with the drawer, the presumption of value belonging to him in the acceptor's hands does not exist, unless the bill bears to be drawn for value. Thus, in one case, where the acceptor's representatives, in consequence of his having paid the bill, brought an action of recourse against the drawer, in respect that the bill did not bear

¹ In the report of *Auchinleck v. Millar*, already noticed, page 87, note 6, reference is made to a case between "Baxter and the Lady Glenlee," in which it is said to have been held, "that a bill of the foressaid nature, without the words "for value," (as in the case of *Auchinleck*,) should not be imputed "in payment of any extrinsic debt by the drawer to the possessor of the bill, "albeit he was debtor by *liquid bonds*." The case itself has not been discovered. But it would probably be more consistent with principle, to hold, in all cases, whether value is expressed or not, that it has been instantly given, unless the contrary be instructed by the payee's writ or oath.

² *Forbes v. Fonnereau*, 10th July 1744, *Morr.* 1474; *Elchies*, No. 24, v. *Bill*.

³ *Vide* also *Watson v. Drummond*, Jan. 1686, 2 *Brown*, Suppl. 89, which, however, depends too much on specialties to be more particularly noticed.

"value in the acceptor's hands," the Court sustained the action¹, thus holding that the *drawer* was bound to prove value. The opinion prevalent at this time² appears to have been, that the drawee, by accepting, acted as the drawer's mandatary, and had, therefore, an *actio mandati contraria* against him in case of paying the bill. The mandate was held to be express, if the bill contained an order to "place it to account;" but, at all events, a mandate was presumed, whether there was such an order or not. The Court afterwards followed probably a similar rule of decision³, where one of two joint acceptors, paying a bill which did not bear to be for "value in his hands," brought an action of recourse against the drawer. But the case is too special to be farther noticed.

It is not probable that this doctrine would now be adopted, although Mr Erskine expresses an opinion in its favour⁴. 1st, All the earlier authorities proceed on the assumption, that the drawee, by accepting the bill, becomes bound *gratuitously* for the drawer, and has, therefore, a claim against him for its amount, unless it shall appear from the bill bearing to be for value in the drawee's hands, or from other evidence, that he is the drawer's debtor. The law of France, which appears to be formed on the principles laid down in the older continental writers, and derived originally from the Roman law of mandate, still enforces these rules⁵. According to them, and even according to Mr Erskine⁶, nothing but the words "value in your (the drawee's) hands" could raise a presumption from the bill that he was the drawer's debtor, and, consequently, even the general words "for value received" could not have this effect. But it is now settled, both in England and in this country, that the acceptance of a bill bearing the general words "for value received" implies an acknowledgment by the acceptor that he is the drawer's debtor⁷. The doctrine

¹ *Cunningham v. Agnew*, 4th July 1711, Morr. 1531.

² *Scaccio di Comm. et Camb.* 2 Gloss. 9 N. 2; *Forbes* 52; *Stair*, i. 11. 7.

³ *Wilson v. Mackenzie*, 10th July 1712, Morr. 1481 and 1531.

⁴ *iii.* 2. 25.

⁵ Compare *Pothier*, No. 97, as illustrative of the old law, with *Pardessus*, 203, No. 203, &c. as explanatory of the present law.

⁶ *iii.* 2. 30.

⁷ *Vide Wallaces v. Barrie*, 29th Nov. 1793, Morr. 1484, where it is laid down generally, (without being limited to the particular case,) that "the

probably be now regarded, and there seems to be no reason why the presumption of value, even for bills or notes, should not be on the same footing in this case as in all other cases. There is another case ¹, where in a question under the vesting act, viz. whether the balance (being not more than £.100 Scots,) of a bill for £.188 Scots, granted by a person attainted after his rebellion, formed, notwithstanding, a good claim against his estate, as having been part of an old debt contracted before his rebellion; the Court, on parole evidence of this last-mentioned fact, decided in favour of the claim. But the question in this case relating to a debt under £.100 Scots, parole proof would perhaps have been admissible, even with regard to its constitution ²; and the only point at issue being the term of contracting the debt, with reference to the effect of the statute, any evidence which was admitted on this point did not contradict the presumption arising *ex facie* of the bill.

A different rule is followed when a bill is drawn for "value in account." If a bill be drawn payable to a third party "for value in account," then, according to the doctrine already laid down ³, *he* will be considered as the party to whom this specification of value refers; and it will be held ⁴, that he has not given value for the bill, except in so far as he is creditor to the drawer, (in account with him,) by payments of cash or counter acceptances. As the words "value in account" are not understood, in such a case, to refer to the acceptor, he will still be liable, on the principles already explained, to the presumption that he has value of the drawer in his hands. But, on the other hand, if these words are used in a bill payable to the drawer, they will, according to a preceding case ⁵, be considered as referring to the drawer. The meaning of the words on that supposition seems to be ⁶, that an account shall be opened, of which this shall be the first

¹ Duncan v. his Majesty's Advocate, 28th Feb. 1754, Morr. 12289. *Vide* also Session Papers. See also M'Kenzie of Fraserdale v. Fraser, ante, 75.

² Hammermen of Glasgow v. Crawford, 5th March 1625, Morr. 12408.

³ Grant v. Da Costa, ante, 90, note 1.

⁴ Forbes v. Fonnerau, 88, note 2.

⁵ Highmore v. Primrose, 89, note 7.

⁶ Tait's Law of Evidence, 3d edition, 475.

article to the acceptor's credit, or that it shall form an article in any account which is actually current between the parties; and the acceptor cannot be held, from his acceptance, to have had value of the drawer, unless in so far as it shall otherwise appear that the latter is creditor in such an account.

These principles will enable us now to examine a question which has been much discussed in the English courts, viz. how far the value implied in a bill or note affords the holder a good answer to the plea of want of consideration, when urged in defence against payment of it.

In the law of Scotland it appears to be settled, with reference to this question, *1st*, That the presumption of value received, when pleaded by the holder of a bill, (whether he is drawer, payee or indorsee,) cannot, as already laid down¹, be redargued, excepting by his writ or oath; *2dly*, That there is no exception to this rule, unless either where there is some vice which affects the essence of the contract, as where the drawee of a bill has been forced to accept it, which may be proved by parole evidence, or where there has been fraud in the transaction, which may likewise, in certain cases, be thus proved; and, *3dly*, That although the first of these objections, (under the limitations to be afterwards explained,) vitiates a bill or note in whatever hands it is, the objection of fraud cannot affect the claim of any but a party privy to it, or be pleaded against a holder of the bill or note, unless it be proved by his own writ or oath that he is privy to the fraud, or holds the document merely for behoof of some party who is privy to it. In a case where a gratuitous indorsee to a bill, granted originally for the price of goods, had re-indorsed the bill to the first holder, who thereupon discounted it, and the discounteer ultimately got full payment from the gratuitous indorsee, who thus acquired right to it again by an onerous title; the latter was found entitled to exact full payment from the acceptor, without being liable to certain objections of insufficiency in the goods, which might have been pleaded against the original payee².

¹ *Wallaces v. Barrie*, 89, note 7. As to the particular kind of value, when specified in the bill, no evidence but the holder's writ or oath can be received to contradict it; *Hay v. Horn*, 1st Dec. 1823, 2 S. D. 546.

² *Kidston v. Stead and Sons*, 21st Jan. 1809, F. C.

The principles of the law of England are different. In England, no written contract, not under seal, is valid, without a consideration given for it on the other side¹, which consideration must, in such a contract, be averred and proved²; and, although this rule is so far relaxed, in favour of bills of exchange and notes, that the holder suing on them is not bound, in general, to aver or prove a consideration given for them, yet this privilege suffers many exceptions.

Thus, when a bill or note, transferable by delivery, has been lost or stolen, or fraudulently acquired from the person having right to it, any party afterwards claiming as the holder of it is bound, on notice given him for that purpose, to prove the consideration for which he got it³.

In Scotland, such a party would be presumed to have acquired the bill or note onerously and *bona fide*; and this presumption could not, in general, be redargued, except by his writ or oath. The foundation of this rule of Scotch law is, that writing cannot be taken away except by writing⁴, or

¹ 2 Blackst. 443.

² Chitty, 11.

³ *Grant v. Vaughan*, 3 Burr. 1524, *per* Lord Mansfield; 2 Shower, 247, *per* Pemberton, C. J.; *Rees v. the Marquis of Headfort*, 2. Camp. 374. This last case was an action by the second indorsee against the acceptor of a bill which was proved to have been impetrated from the latter by fraud. In *Lawson v. Weston*, 4 Esp. 56, certain bankers were found entitled to recover from the acceptors the amount of a bill which had been lost by or stolen from a previous holder; but only on proving that they had acquired it *bona fide* for value received. In *Paterson v. Hardacre*, 4 Taunt. 113, a similar doctrine was held regarding the burden of proving a consideration, though the holder was exempted from this proof on another ground. Here also the onerosity of the plaintiff's title appears to have been proved. Contrast all these cases with the Scotch case of *Lambton and Co. v. Marshall*, 21st Jan. 1799, *Morr. App. v. Bill*, p. 11. In *Lee v. Newsome*, 1 Dowl. and Ryl. C. N. P. 50, a tradesman who had got a banker's check at its full value, in payment of a debt, was found entitled to recover on it against the drawer, though it had been stolen from the previous holder, there being no fraud on his part. The opinion expressed by Lord Ellenborough in one case, *King v. Milsom*, 2 Camp. 5, seems to adopt nearly the doctrine of the law of Scotland with regard to all instruments generally, (whether bills or notes,) that pass by delivery. But this point being again alluded to in *De la Chaumette v. The Bank of England*, 9 B. and Cr. 208, it was held that a foreign merchant, receiving a bank-note, must shew that he gave such value for it, as to exempt him from reasonable grounds of suspicion.

⁴ *Vide* cases cited in *Tait on Evidence*, 326-7, and especially *Jaffray v. Robertson*, 2d Jan. 1712, *Morr. 12337*, where the acceptor of a bill suspending

by the oath of party, which is admitted as the best kind of proof. There is no exception to this rule, unless the person claiming as holder of the bill or note be charged with fraud; and, even in that case, parole proof is not always allowed. The decisions of the Court are not uniform on this subject; but the following conclusions may probably be deduced from them. In the *first* place, when an allegation of fraud is not contradicted *ex facie* of the bill, parole proof of it will be allowed against any party privy to it, but not against an indorsee or holder, unless he is also alleged to be privy to it. Both of these propositions were illustrated in a case², where a bill alleged to have been lost or stolen was discounted by an unknown party with a respectable bank, who, having thereafter claimed as indorsees against the drawer, the Court required no proof from them that they were onerous or *bona fide* holders; but, in respect of their *avermant* to that effect, and that the other party had offered no proof to the contrary, or to shew that the claimants knew of the bill being previously lost or stolen, sustained their claim. It was here implied, that parole proof of fraud against the holders of the bill would have been competent; but, as none was offered, the indorsation was held sufficient, without proof of their onerosity and *bona fides*. A similar decision was given on the same grounds, in a subsequent case³. There were two analogous cases⁴ respecting bank notes alleged to have been stolen from letters in the Post-Office, which were found, however, to belong to the onerous holders, in competition with the parties from whom they were said to have been stolen. The onerosity of the holders in these cases appears to have been proved; but, according to a case already cited⁴, it would, at any rate, have

a charge on it was not allowed to contradict, by parole proof, his own admission in the bill as to the sum due.

¹ Lambton and Co. v. Marshall, 21st Jan. 1799, Morr. App. to Bill, 11.

² Scott and Co. v. The Kilmarnock Banking Company, 27th Feb. 1812, F. C., where the Court decided in favour of bankers who had discounted to a stranger a bill alleged to have been lost or stolen, after a report of bankers that they had exercised sufficient diligence. But the facts on which this report proceeded appear to have been taken on the statements of the party.

³ Crawford v. The Royal Bank, 24th Feb. 1749, Morr. 875, and Swinton v. Beveridge, 11th June 1799. Morr. 10105.

⁴ Lambton and Co. v. Marshall, *ante*, 116.

been presumed, unless fraud in acquiring the notes had been established. Such proof would have been allowed in that case, because the alleged fraud was of a nature which could be neither confirmed nor contradicted *ex facie* of the bill. But, on the other hand, 2dly, when any charge of fraud against a payee or indorsee, with reference to the condition on which he holds or enforces payment, is contradicted *ex facie* of the document, as when he is alleged to have got it under a condition which he has not fulfilled, although he appears *ex facie* to hold it absolutely, or to have got it in collusion with another person, to assist his fraudulent schemes, though the bill or note bears that he is an onerous holder, no proof is admitted except his writ or oath. For, after a person has either subscribed a bill or note in favour of a certain payee, or indorsed it, or put it subscribed by him into the hands of a third party, whom he thus empowers to transfer it, he cannot be allowed to plead against the holder that his right is not onerous, in other words, that it is different from what it appears to be *ex facie* of the bill or note, unless he proves his allegation by evidence as good as that of the bill or note, viz. by the holder's writ or oath. Thus¹, one acceptor of a bill having alleged that the indorsees, who charged him for payment, had retired the bill in collusion with a co-acceptor, in order that full payment might be exacted from the suspender, the Court decided that such an allegation could not be proved unless by the indorsee's writ or oath. Again², in a charge by indorsees, on a bill which had been granted as a fraudulent preference to certain of the acceptor's creditors, the Court refused to admit the averment that the indorsees knew this fact when they took the bill, in respect it was not offered to be proved by their writ or oath; it being held, that "such allegations, as they were directed only against the *bona fides* " and onerosity of the indorsation," could not be proved otherwise. Afterwards³, a similar decision was given with regard to the allegation, that a bank, the indorsee of certain bills, had applied them to a different purpose from that for which

¹ Wright v. Ritchie, 24th June 1809, F. C.

² Craig v. Shiells and Co. 15th Dec. 1809, F. C.

³ John Scott, Petitioner, 19th Dec. 1809, F. C.

they had been granted. In another case¹, of a charge by the indorsee against the granter of two promissory-notes, although it was proved that the notes had been granted while the granter was bankrupt, for securing an illegal preference to a particular creditor, and though there was strong reason to suspect that the holder had taken an indorsation to them collusively, in order to make good that preference, the Court refused to allow any proof on that subject, but his writ or oath. The principle of decision appears to have been the same in many later cases². In one case³, the Court passed a bill of suspension, on an offer of parole evidence by the acceptor of a bill, to prove, 1st, That his acceptance had been obtained by fraud; and, 2dly, That the bill, having been accepted blank in the drawer's name, the chargers had, in collusion with the persons who obtained the acceptance, filled in their names as drawers, without paying any value. But, besides that the case was not finally decided, it might be held that the alleged fraud in it affected the constitution of the holder's right, since his name was not inserted by the acceptor, but was said to have been fraudulently inserted by him, in a blank left for the purpose at the time of acceptance, in furtherance of the fraudulent scheme to which he was alleged to have been a party. The case cannot, therefore, be held to weaken the authority of the general rule. Nor is that rule contradicted by a case⁴, where the Court, after allowing inspection of the books of the

¹ *Arrol v. Marshall*, 14th Jan. 1821, F. C.

² *Macintosh v. Macleod*, 7th July 1821, 1 Shaw, 108; *Denniston and Co. v. Thomson*, 2d Feb. 1822, *ibid.* 289; *Monro v. The Renfrewshire Banking Company*, and *Turner v. Ditto*, 8th Feb. 1822, *ibid.* 305-6, where an offer to prove non-onerosity, even by the charger's books, was rejected, in respect that it was too vague. *Vide also Hay v. Horn*, 1st Dec. 1823, 2 S. and D. 546; *Bell v. Geikie*, 2d Dec. 1823, *ibid.* 546; *Mitchell v. Cairncross*, 6th March 1824, *ib.* 774; *Nasmith*, 24th June 1824, 3 S. and D. 166; *Donaldson v. McDonnell*, 15th June 1825, 4 S. and D. 87; *Dunlop v. Reid*, 13th June 1827, 5 S. and D. 796; *Peat v. Wilson*, 8th Dec. 1827, 6 S. and D. 225; *Wilson*, 18th Dec. 1827, 6 S. and D. 259; *Beunnett v. Burgess*, 27th May 1828, 6 S. and D. 854; *Adam v. Boyd*, 12th June 1830, 8 S. and D. 914; *Winton*, 1st June 1831, 9 S. and D. 662; *Jameson*, 23d Nov. 1832, 11 S. and D. 80; *Haig*, 29th Nov. 1832, 11 S. and D. 145; *vide also Campbell*, 21st Jan. 1832, 10 S. and D. 229; *Sandeman and Miller v. Thomson*, 12th Nov. 1831, 10 S. and D. 4.

³ *Andrew v. Buick and Co.* 1 Shaw, 78.

⁴ *Pentland and Son v. Bell and Co.* 23d Jan. 1822.

holder of a bill, first admitted a proof at large, and finally reduced the bill, as granted without value, on account of the suspicious nature of the books, and the want of a satisfactory explanation regarding them. The rule applicable to that case appears to have been, that every merchant's books must be regular, and all entries in them be fully explained, otherwise he is to be held *pro confesso* as if he had refused to produce them, or at least other evidence may be admitted against him. In another case¹, the holder of a bill blank indorsed having brought an action against the acceptors, a proof at large was allowed of an allegation of fraud by the original payee, to which he was said to be privy. But the circumstances of the case, more especially his own statement as to his mode of acquiring it, and a delay of five years after the term of payment in bringing his action, were held, independently of all other evidence, to create a presumption against his onerosity and *bona fides*. In another case², where there was as great delay in bringing the action, but where the indorsee's account of his mode of acquiring the bill was exposed to no suspicion, it was found, that his right could not be redargued except by his writ or oath. A different rule, indeed, appears to have been adopted in one earlier case³, where, in an action by the indorsee against the acceptor of a bill, the Court allowed to the latter parole proof of an allegation, that the indorsement was a contrivance between the drawer of a bill and the holder, to evade certain defences which the acceptor had against the drawer. But this case, though frequently cited, has been since disregarded. There are other cases, which are not very easily reconciled with the rule now stated. Thus, in one case⁴, the indorser of a bill who had retired it was, notwithstanding the plea of his being an onerous holder, found not entitled to recover its amount from the acceptor. But the pursuer was confessedly general agent of the drawers, for whose accommodation the bill had been granted; and there were various circumstances, some instructed by his writ, and others not denied, from which the Court held it to

¹ Thomson v. Maclauchlans, 8th Nov. 1823, 2 Shaw, 947; Session Papers.

² Ferrie v. Mathie, 24th June 1824, 3 Shaw, 174.

³ Corrie v. Aitken and others, 27th July 1785, Morr. 1520.

⁴ Campbell v. Dryden, 25th Nov. 1824, 3 S. and D. 330.

be proved that he had retired the bill for the drawer, who was the proper debtor. Even under these circumstances the case was decided by the narrowest majority, and the majority intimated that they proceeded on its special circumstances, as taking it out of the general rule. In a subsequent action by the same pursuer, on a bill indorsed to him by the same parties, under circumstances somewhat different, the Court, holding that there was no proof of his agency in this case, refused to allow his onerosity to be disproved except by his writ or oath¹. In a late case², between bank agents and the notary who protested their bills, for the amount of a bill which they had been unable to recover, from his blunder in protesting, the Court held it competent to prove by the bank books, and the states transmitted by them to their constituents, (the bank,) that the bill was not truly discounted by them as bank agents, and that nothing was due on it. It may be doubted whether these documents were not the writ of the holders, though the Court do not seem to have so considered them. In another case³, where the acceptor of a bill was charged on it by a party who was held to have acquired it as his agent, and where the holder gave a statement which appeared to make his onerosity depend on the accounts between him and his client, a bill of suspension was passed to investigate the state of accounts. In these cases, there was the important element of agency, and they do not, when considered, interfere directly with the rule now stated, though they indicate some relaxation of it.

On the other hand, it may be laid down, *3dly*, That fraud in acquiring a bill or note may be proved by parole evidence against the payee, or, perhaps, even against an indorsee, although the allegation should be contradicted *ex facie* of the document, by its bearing or implying to be given for value; for this is a case of *fraus dans causam contractui*, which vitiates the consent on which the holder's right is founded, and the reasons that exist against subjecting a *bona fide* indorsee to such an inquiry are not applicable here, as the document is in the hands of the party said to have been guilty of the fraud.

¹ *Campbell v. Smith*, 12th June 1827, 5 S. and D. 794.

² *Murray and Son v. Taylor*, 15th May 1828, 6 S. and D. 892.

³ *Carruthers v. Johnstone*, 19th June 1830, 8 S. and D. 957.

This was held in a case¹, where the Court were of opinion, that a charge of fraud by the acceptor against the drawer of a bill, in obtaining his signature, would have formed a relevant subject of proof, though the statement made was not considered as specific enough to afford ground for his judicial examination. Judicial examination, however, has been allowed in many other cases, where there were circumstances of suspicion². It is likewise implied in a previous case, that the charge of fraud would have been relevant against the party who got the bill, if his name had been inserted as payee³. The same principle was adopted in another case, to be immediately noticed⁴, where the Court reduced a promissory-note, in an action brought by the granter against the original payee. These three rules seem to contain the essence of what has been decided in Scotland upon the effect of "value received," as implied or expressed in a bill or note in regard to the

¹ *Goodfellow v. Madder*, 27th July 1785, *Morr.* 1483. It will be observed, however, that this case was decided the same day with the case of *Corrie v. Aitken*, 98, note 3, the decision in which is now admitted to be erroneous.

² A judicial examination was allowed, on account of some suspicious circumstances, particularly the circumstance of the defender first saying that he had no books, and then producing them, in the case of *Campbell v. Turner*, 24th Jan. 1822, 1 *Shaw*, 266; and also in the case of *Cairncross*, 6th March 1824, 2 *S.* and *D.* 774, though, on advising the declarations of both parties, the Court sustained the holder's right to the bill; but it was refused, as there were no such circumstances, in the case of *Campbell v. Hill*, 29th Nov. 1826, 5 *Shaw* and *D.* 54, and *Fac. Coll.* In this last case, the Court expressed a strong opinion against judicial examination, (unless where such suspicious circumstances existed,) as to facts which could properly be proved only by the party's writ or oath. The same doctrine was enforced, by refusing an examination, in *Dunlop v. Reids*, 13th June 1827, 5 *S.* and *D.* 796. In the case of *Wilson jun. v. Pollock, Gilmour and Co.* 13th Nov. 1827, 6 *S.* and *D.* 7, it was decided, under circumstances indicating that the drawees of two bills had got them without value, that they must condescend on the value given by them. In *Fell v. Lyon*, 16th Feb. 1830, 8 *S.* and *D.* 543, judicial examination of a party was required as to the circumstances under which he had acquired a bill, of which he was apparently onerous holder, the statement on this subject in his defences being held to be suspicious. In another case, *Smith v. Stark*, 16th Dec. 1831, 10 *S.* and *D.* 150, where the defender admitted that he had not paid instant value for a bill which he held, though he alleged that a counter-claim was due to him, while the pursuer alleged that the bill had been given him merely to be discounted, and where his declaration on the subject was evasive and contradictory, he was ordained to restore the bill.

³ *Andrew v. Buick and Co. ante*, 97, note 4.

⁴ *Meikleham v. Ker*, 22d Feb. 1823, 1 *Shaw*, 240.

charge of fraud¹. How far indorsees of a bill or note are entitled to plead the privileges now explained, when they have taken it after the term of payment, is a question to be afterwards considered under the head of indorsation. Part of what falls properly under that head has been now anticipated; because the doctrine of "value received," from which it arises, applies to the indorsation as well as the constitution of bills or notes.

With regard to bills or notes granted under the dread of personal violence, it would appear from one case², that the law of England supports an action on such a bill or note against the granter at the instance of an indorsee, provided the indorsee proves that he gave an onerous consideration for it. In Scotland, force used to obtain the subscription

¹ There are three other cases, which appear, at first, to go farther than the rule last laid down, but which are not truly inconsistent with it. In the first, *Robertson v. Ogilvie*, 6th March 1755, *Morr.* 1527, a person who was said to have got an accepted bill only in security for the delivery of some victual, to be given back on delivery of the victual, and who was accordingly decreed by an inferior court to give it up, on a parole proof of these facts, having, notwithstanding, suspended the decree, and put ultimate diligence in force on the bill, the Court confirmed the decree of restitution, and found him liable for oppression and damages. But he had not objected to parole proof at first, nor did he deny the facts stated, so that they might be held as proved by his admission, which was equal to his oath. In another case, *Arthur v. Oldcorn*, 29th Jan. 1717, *Morr.* 1482, it was found, that the payee of a bill could not, on its non-acceptance, enforce payment against the drawer, in the face of a liquid claim of compensation against him by the drawer, which was instantly instructed, and which arose out of the same transaction on account of which the bill had been drawn. But this decision proceeded on the separate ground of compensation *de liquido in liquidum*. In a third case, *Borthwick v. Bremner*, 13th June 1833, 11 S. and D. 716, where the holder of a bill had presented it to a bank for discount, and it had not been discounted, but the bank retained it and brought an action on it against the acceptor, they were allowed, before answer, to prove, by parole evidence, that the holder had allowed them to retain it in security of a prior debt. Here, the bank had the *prima facie* title to the bill, and their averment of the condition on which they had been allowed to retain it was truly a limitation of their right *ex facie* of it, and, by offering such proof, they abandoned the presumption arising in their favour *ex facie* of the bill. The proof failed. *Id. v. eund.* 22d Nov. 1833, 12 S. and D. 121.

² *Duncan v. Scott*, 1 Campb. 100, where, in an action by the indorsee against the drawer of a bill, who had granted it while in prison, and in consequence of a threat that he would otherwise be put to death and his effects confiscated, Lord Ellenborough held, that, as the drawer was not a free agent at the time of granting the bill, the plaintiff must prove that he had given a consideration for it; and, as he failed to do so, he was non-suited.

of a bill or note nullifies that subscription, as much as in the case of any other contract, since the subscriber's consent, which is essential to every contract, is wanting. The party is not bound by such a subscription more than if it had been forged; and, as an obligation originally null cannot become valid by transmission, even an onerous indorsee cannot have a better claim under a bill or note thus subscribed than the original payee. This point has been decided¹ against the onerous indorsee in two cases of actions on bills granted to the original payee through concussion. In the last of these cases, where the bill had been obtained for an exorbitant sum by the threat of imprisonment, the successful argument was nearly that which has been now stated. It appeared that the original payee had indorsed the bill, after certification had been given against him in a reduction of it. But the case was decided on the general principle. This principle does not seem applicable, when the party subscribing voluntarily interposed his consent, although it should have been imputed from him under circumstances which raise a good objection against the original payee: for instance, where it has been obtained by fraud, or by a mixture of deception and terror, though without such a degree of violence as would influence a man of ordinary constancy. In a case of this kind², where a party, whose cattle had broken into a field, was intimidated, by the threat of a law-suit, to grant a bill to the owner for an unreasonable sum of damages, the Court, in a suspension and reduction of the bill against the payee, decided that it must be reduced, in so far as the damages were exorbitant. In a later case³, where a promissory-note had been imputed from a man of weak mind, for damages on account

¹ *Willocks v. Callendar*, 26th Nov. 1776, *Morr.* 1519, and *Wightman v. Graham*, 16th Dec. 1787, *Morr.* 1521.

² *Forman v. Sheriff*, 24th May 1791, *Morr.* 16515.

³ *Meiklewham v. Ker*, 22d Feb. 1823, 1 *Shaw*, 240. In another case, *McLachlan v. Campbell*, 1 *Shaw*, 162, where a debtor in certain bills was prevailed on, while in prison, to grant new bills, not only for the amount of the former bills, but for the expenses of diligence upon them, the Lord Ordinary, in respect that these expenses were not properly liquidated, passed, without caution, a suspension of a charge on these bills by the creditor, and the Court affirmed his judgment. But such bills would probably have been good to an onerous indorsee.

of criminal intercourse with the payee's wife, which had taken place by collusion betwixt the wife and husband, to extort money, the Court reduced the note in an action against the payee, and would not allow a reference of resting owing to the granter's oath. But it does not appear that the grounds of reduction in either of these cases could have been pleaded against an indorsee suing on the bill or note; for in both cases there was a real consent, and consequently an obligation, which, till reduced, was transmissible to a third party. It was not as in the case of force, where there is no consent. On the contrary, the granter had, by his own act, given currency to the obligation; and his objections against it, being personal to the original payee, could not be urged against an indorsee, who was not privy to them. It was perhaps on such grounds, that the Court¹ refused to sustain it as a defence by the acceptor of a bill against an onerous indorsee, that the drawer had induced the acceptor to sign it when he was intoxicated; it being answered, that drunkenness was only a temporary incapacity, arising from the acceptor's own fault. Such a bill would probably have been reduced in a question with the drawer himself. In a later case², where a person who had accepted a bill brought an action of relief, on the allegation, that he had accepted it while a minor, on the defender's account, for the price of some goods bought by him from the payee, which facts he proved before an inferior court by the payee's oath and that of his wife, (the bill being below £.100 Scots,) the Court, notwithstanding, held, that such allegations could not remove the presumption arising from his being acceptor, unless they were proved by the writ or oath of party. There was here no reduction on the ground of minority. On the same principles, it will be presumed, that an indorsee, under the circumstances now mentioned, holds the bill or note onerously and *bona fide*, unless the contrary be instructed by his writ or oath. Such pleas, even against the

¹ Wilson and Fraser v. Nisbet, 24th Feb. 1736, Morr. 1509. *Vide* also in England, Norham v. Latouche, 4 Carr. and Pay. 140, where it was held to be no objection to an action on a bill by an onerous indorsee, that the acceptor was intoxicated when he signed it, unless the indorsee had known the fact.

² Reid v. Proudfoot, 6th Dec. 1758, Morr. 12344.

original payee of a bill or note, are obviated by partial payments to account of it¹.

The principles applicable to subscriptions obtained through force, seem to apply wherever legal consent is wanting. For instance, in the case of a bill or note signed by a minor having curators without their consent, although it has been held in England², that a *bona fide* onerous indorsee is entitled to recover on such a document, even when the minor has been fraudulently induced to grant it, probably such an indorsee would not be protected in Scotland, if the minor's consent was not legally given, which, in general, it could not be without his curators³. If the minor's consent was validly given, although fraudulently obtained, want of onerosity or *bona fides* in an indorsee could not be proved except by his own writ or oath.

The law of England agrees so far with the doctrine already laid down regarding the privileges of indorsees, that, although a bill or note should have been given without value to the original payee, this cannot be pleaded against an onerous indorsee, though he was aware of it at the time of taking the bill⁴; and still less though he should know that the bill or note was given to the original holder entirely for his accommodation⁵. But it differs from the law of Scotland

¹ Thomson v. Annandale, 23d Jan. 1829, 7 S. D. 305.

² Morris v. Lee, Chitty, 78; Bayley, 500. Vide also Haly v. Lane, 2 Atk. 182, where a similar doctrine is laid down.

³ This subject shall be more particularly discussed afterwards, in considering who are the proper parties to bills of exchange.

⁴ In Collins v. Martin, 1 Bos. and Pull. 651, this plea was found unavailable against an onerous indorsee of bills, although the previous holder, who indorsed them to him, had received them blank indorsed from the original payee, solely that he might recover payment for his behoof. The same doctrine was laid down per Lord Hardwicke, Comyn's Rep. 43; per Buller, J., in Lickbarrow v. Mason, 2 T. R. 71; per Lord Loughborough in Du Bras v. Forbes and Gregory, 1 Esp. 117. Vide also Haly v. Lane, 2 Atk. 182.

⁵ Per Lord Eldon in Smith v. Knox, 3 Esp. 47. In Charles v. Marsden, 1 Taunt. 224, the plea of a bill being an accommodation-bill, was held ineffectual even against indorsees who had received it after the term of payment. In Bosanquet v. Dudman, 1 Stark. part 2, 1, the plaintiffs (bankers) being creditors of the parties from whom they had got the bill in question, to a greater amount than the balance of cash in their hands, were found by Lord Ellenborough to hold all the securities in their hands, and, among others, the bill in question, for value, on account of the balance due to them. It was therefore

in two points, viz. 1st, That, when fraud is alleged against the original holder of the bill or note, the indorsee will be bound to prove that he gave value for it; whereas, in Scotland, this will be presumed, unless the contrary be proved by his writ or oath; and, 2^{dly}, That it may be proved in England by parole evidence, ~~that the indorsee was privy to the original holder's fraud~~; for instance, that he knew of the holder having got the bill or note for a different purpose from that to which he applied it¹; whereas, in Scotland, no such objection, as already shewn, can be proved when it goes to contradict the bill or note, unless by the indorsee's writ or oath. It has been likewise held in England², that parties who got a bill or note from the drawer, for whose accommodation it was accepted, but afterwards returned it to him as useless, and then got it back, for what purpose did not appear, could not sue the acceptor on it; and farther³, that the holders of an accommodation-bill could not sue the acceptor for a greater part of its amount than appeared to be the debt due to them by the party for whose accommodation it was accepted. This last plea would have been relevant in Scotland, if proved by the writ or oath of the holder. But neither of the defences in these two last cases could have been otherwise proved.

In a question between the original parties to a bill or note, or between the indorser and indorsee, as to whom the indorsement forms a new contract, it has been held in England, (independently of fraud,) that parole evidence can be brought even of want of consideration⁴, or of a partial failure of the

decided that they were not liable to the defence of this bill being an accommodation-bill. A similar rule was followed in *Marshall, ex parte* 1 Atk. 131; *Arden v. Watkins*, 3 East. 122, and *Mallet v. Thomson*, 5 Esp. 178. In Scotland the same doctrine was held in the recent case of *Ferguson v. Gordon, Batt and Co.* 9th July 1825, 4 S. and D. 165.

¹ *Smith v. Knox*, 3 Esp. 47.

² *Cartwright v. Williams*, 2 Starkie, 340. *Vide* also *Fletcher v. Heath*, 7 B. and C. 517.

³ *Jones v. Hibbert*, 2 Stark. 304. In *Wiffen v. Roberts*, 1 Esp. 261, the same doctrine was held in an action by the indorsee against the drawer of an accommodation-bill, though the plaintiff was non-suited on another ground. *Vide* also other cases on the same subject noticed by Chitty, 32-3.

⁴ *Jeffries v. Austin*, 1 Str. 674. In *Solomon v. Turner*, 1 Stark. 51, which was an action by the payee against the maker of a note, inadequacy of consideration, viz. the alleged inferior value of certain pictures sold by plaintiff to de-

contract, where it is divisible¹, and, farther, that payment may be resisted on proof that the bill or note was granted under a condition which the payee has failed to implement². This last doctrine does not appear consistent with what is established in England, viz. that parole evidence of an agreement to grant indulgence on a bill or note cannot be received as a defence against the document itself³. In Scotland, none of these defences could be proved, even between the original parties to the bill or note, unless by the holder's writ or oath. But when the circumstances connected with the granting of a bill were indicative of want of value, the drawer and holder was held bound, without a reference to his oath, to specify the

defendant, was admitted to proof only in connection with other circumstances, as indicative of fraud, in order to annul the contract. In *Richmond v. Heapy* and another, 1 Stark. 202, it was held a good answer to a claim by a company on a bill drawn in their name, and accepted by the defendant, that he had accepted it for their accommodation, and that one of the partners had agreed to take it up when due. In *Jackson v. Warwick*, 7 T. R. 121, the same rule was enforced against the payee of a note granted for apprentice-fee, in respect that the consideration for it, viz. the apprenticeship, had failed, from the indenture being written on a wrong stamp, and not specifying the *premium* in terms of the stamp laws. In *Grant v. Welchman*, 16 East. 207, the same rule was laid down in the case of a note granted for apprentice-fee, though it was held to be inapplicable.

¹ In *Barber v. Backhouse*, Peake, 61, which was an action by the payee of a bill against a firm in whose name it was accepted, verdict was given only for £.5. 9s., the sum really due by them, one of the partners having fraudulently accepted the bill in their name for an additional sum due by himself to the payee. In *Ledger v. Ewer*, Peake, 216, which was an action by the drawer against the acceptor of a bill granted in consideration of the former admitting the latter into partnership, Lord Kenyon directed the Jury to find only for the amount of damage sustained by the plaintiff, and they returned a general verdict for the defendant. In *Darnell v. Williams*, 2 Stark. 166, the same rule was enforced in favour of the maker against the payee of a promissory-note, which had been granted in part for the latter's accommodation.

² In *Wienholt v. Spitta*, 3 Campb. 376, it was held, that if a party grants a draft on condition that the payee shall discharge him from a certain debt without interest, and he announces his intention afterwards of exacting interest, that breach of condition will entitle the latter to stop payment of the draft. In a late Scotch case, *Carrick v. Mills*, 7th Mar. 1828, 6 S. D. 735, where bills had been granted to an heir of entail in possession, for the value of wood to be cut on his estate, but the cutting was interdicted by another heir of entail, a suspension of a charge given on one of the bills, by a party held to be identical with the original payee, was passed without caution, to the extent of the alleged value of the wood as to which an interdict had been granted.

³ 12, note 3.

particular value which he gave for it¹. A judicial examination has also been allowed under circumstances of suspicion². There are likewise many cases where the presumption of value arising *ex facie* of a bill or note has been held to be done away, not only by the holder's oath, but by his writ or admission³.

Although the holder of a bill, before his onerosity and *bona fides* are referred to his oath, should be convicted of an infamous crime, so as to disqualify him for being a witness, it would rather seem that he cannot plead his own infamy to exclude his opponent from getting his oath, *valeat quantum*. In a recent case⁴, where the holder of a bill was found liable to all the exceptions pleadable against the drawer, and where the suspender, who was the drawer's brother, offered to prove, by the drawer's oath, that he had got the bill without value, it was maintained that such a reference must be admitted, although the drawer had been convicted of an infamous crime during the dependence of the process. It was urged, that the charger, who appeared as trustee for certain of the drawer's creditors, was identified with the drawer, and could not, therefore, plead the drawer's infamy against such a reference, more than the drawer himself. But the Court, by the narrowest majority, (one of the Judges proceeding partly on the ground, that the drawer, who was bankrupt, was now only a witness, and partly on the ground of his relationship to the suspender,) held him to be disqualified by infamy. The objection of relationship was disregarded by the majority of the Court. The judgment has been affirmed on appeal⁵, but on special grounds, and with an intimation, that it was not meant thereby to decide that infamy excluded a party's oath of reference.

In those cases where the question of value or *bona fides*

¹ *Wilson and Others v. Pollock, Gilmour and Co.* 13th Nov. 1827, 6 S. and D. 7.

² *Vide* cases on this subject, *ante*, 100, note 2.

³ *Vide* *Halliday*, 13th Dec. 1820, 5 S. and D. 116; *Carruthers*, 19th June 1830, 8 S. and D. 957; *Fortune*, 9th Dec. 1831, 10 S. and D. 115; *Thomson v. Kidd*, 10th Dec. 1833, 12 S. and D. 190. *Vide* also *Barrie*, 2d March 1833, 11 S. and D. 509, and *Wyllie*, 30th Nov. 1832, 11 S. and D. 151, where the charger's oath supported his onerosity.

⁴ *Ritchie v. M'Kay*, 7th March 1826, 4 S. and D. 534; F. C.

⁵ 3 W. and S. App. Cas. 484.

is referred to the oath of a payee or indorsee, he must answer all special questions which relate to either of these points ; and, accordingly ¹, the indorsee of a bill, on a reference to his oath, having deponed in general that he had given value, but declining to answer questions as to the kind of value given, the Court decided that he " was not entitled to the privileges of " an onerous indorsee." In an analogous case in England, the drawer having been called to say, that a bill had been granted for stockjobbing differences, and declining to answer, it was held that there was no value, and there was a verdict for the defendant ². If the party's oath refers the onerosity of the bill to separate transactions, which require to be proved by other evidence ; for instance, if he depones that the bill has been granted for a balance due to him by a third party, while the accounts between him and that party are unsettled, and the alleged balance is denied, the case must be decided by the evidence of those transactions to which he thus refers ³. But an advance previously made to the acceptor is sufficient value ⁴.

The facts which would be relevant in England, as already mentioned, if proved by parole evidence, would have equal weight in Scotland if proved by the writ or oath of the payee or indorsee. It will be sufficient, for instance, to prove thus against either of them, that they obtained the bill or note wholly or in part without consideration, or that they obtained it fraudulently, or that they are now applying it to a different purpose from that for which it was given to them. In England, it has been held, that, when the consideration for the bill or note is a contract, which has not entirely failed, but there is merely such a partial failure of it, as resolves into an unliquidated claim of damages, as, when bills have been accepted in consideration of the payee giving the acceptor the lease of a house, and he has let him into possession, but given him no lease ⁵, or for the price of some

¹ *Swan v. Swan*, 30th June 1786, *Morr.* 9418.

² *Thomas v. Newton*, 2 C. and Pay. 606. A similar decision was also given in *Davidson v. Corden*, 2 C. and Pay. 11.

³ *Donaldson v. M'Donell*, 28th Jan. 1826, F. C.

⁴ *Moffat v. M'Kensie*, 10th Dec. 1822, 2 S. and D. 75.

⁵ *Noggridge v. Jones*, 14 East. 485 ; 3 Campb. 38.

goods which are alleged to have turned out unmarketable ¹, or for a pipe of wine ², or of other articles ³, which turn out bad, or where a note has been taken for apprentice-fee, by way of indulgence, (the money being payable at the beginning of the apprenticeship,) but the apprenticeship is broken off by the master's fault, before its termination ⁴, or when a note has been granted for apprentice-fee, and the apprentice leaves his service on account of the indenture not being properly stamped, while it was still in his master's power or his own to get it properly stamped ⁵, or where a note has been granted for the price of a new invention, which turns out to be an improvement, though not to the extent represented by the plaintiff ⁶; there is merely a counter claim for damages, but no defence against payment of the bill or note. When a bill has been granted in part of the price of goods sold, it is no defence against payment, that, after they were for two months in the hands of the vendee's agent, the vender has again forcibly taken possession of them, it being held that the contract was complete delivery, and that the remedy was by trespass against the vender, as against any third party. Besides, the vendee had the use of the goods in the mean time, so that, in any view, the consideration had not entirely failed ⁷. It has been decided ⁸, that, when a note was granted, payable at a certain day, as part of the consideration for the payee executing a conveyance of an estate, the rest of the consideration being a sum payable at a future day, it is no defence against payment of the note, that the conveyance had not yet been executed or offered. It was held that the note was an absolute obligation, separate from the bargain, as to which, taken *per se*, the price and conveyance would

¹ *Morgan v. Richardson*, 3 Campb. 40; also *Obbard v. Betham*, 1 M. and Malk. 483.

² *Fleming v. Simpson*, 1 Campb. 40, note.

³ *Tye v. Gwynn*, 2 Campb. 346.

⁴ *Grant v. Welchman*, 16 East. 207.

⁵ *Mann v. Lent*, 10 B. and Cr. 877.

⁶ *Day v. Nix*, 9 Moore, 159.

⁷ *Stephens v. Wilkinson*, 2 B. and Ad. 320.

⁸ *Spiller v. Westlake*, 2 B. and Ad. 155. As to implement of the bargain which formed the consideration, reference is made also to *Evans v. Morgan*, 2 Tyrwh. 396, and 2 Cr. and Jerv. 453.

have been concurrent acts. On the other hand, if the contract is rescinded, the consideration of the bill or note fails, and payment of it cannot be enforced¹. The principle of this distinction seems to be², that, though the contract may be divided, if part of the consideration fails, this is not the case with any security, such as a bill or note, granted in implement of the contract, which, being indivisible, must remain entire, unless the consideration has entirely failed. Such a distinction may be necessary in England, in order to restrain the latitude of parole proof, which would otherwise, in this case, be admitted in defence against a liquid written obligation. But, in Scotland, where the presumption of value arising on the face of the bill or note cannot be redargued unless by the holder's writ or oath, there appears to be no danger in giving full effect to such evidence against himself, in the way of direct defence against payment, whether he admits that the contract has failed entirely, or that there is merely such a partial failure in implement of it, as forms a ground of abatement from the amount of the bill or note.

The private books of the holder of a bill or note, or those of the company to which he belongs, being properly his writ, may be recovered by a diligence, in order to disprove his onerosity³.

The question of value may be competently referred to the oath of a party, for whose behoof the holder has deponed that he holds it⁴.

It seems to be a sufficient answer to the plea of want of con-

¹ Chitty, 81; Bayley, 494, &c. In *Lewis v. Cosgrave*, 2 Taunt. 2, it was ultimately held to be a good defence against payment of a banker's check, given for the price of a horse, that the horse had been returned as unsound, and that, (although the plaintiff had at first refused to receive him back,) the horse had been at last put into his stables without his knowledge; it being held that the plaintiff knew of the unsoundness, and was therefore barred, by his own fraud, from pleading that the contract had not been rescinded. *Vide* *Solomon v. Turner*, 1 Stark. 51, and *Tye v. Gwynn*, 2 Campb. 346, where it was held that the proof of fraud would have annulled the contract altogether, and thus afforded a complete defence against payment of the note. Also, *Poulton v. Lathmore*, 4 M. and R. 208; *Archer v. Bamford*, 3 Stark. 175, and Chitty, 89, note d.

² *Per* Lord Ellenborough in *Tye v. Gwynn*, 2 Campb. 347.

³ *Cuthill v. Monteath*, 19th July 1825, 4 Shaw and D. 124.

⁴ *Innes v. Lawson*, 9th Feb. 1828, 6 Shaw and D. 513.

sideration, whether instructed, as in England, by parole evidence, or established, as in Scotland, by the holder's writ or oath, that it was granted in implement of an obligation in honour¹, or in morality², or of a natural obligation, as to provide for a child³, or of a debt due by a third person⁴, or in consideration of forbearance to his representative⁵, or of a debt barred by prescription⁶, or by a discharge or certificate⁷, but not that it was granted from affection to a child, or gratitude to his father, or from an intention to evade the legacy duty, it being held, in this last case, that it would be a donation *mortis causa*, which cannot be constituted by bill⁸.

Although the want of consideration for a bill or note cannot, for the reasons already stated, be proved, according to the law of Scotland, unless by the holder's writ or oath, any sort of proof is competent to establish, as a ground for refusing action on such documents, that the consideration given, either for the granting or indorsation of them, was illegal. For the concealment of illegality under the disguise of an onerous deed is part of the scheme devised by both parties to defeat the law; and this cannot be counteracted, without endeavouring to get at the truth of the transaction by any competent evidence⁹. This rule, however, will, in general, affect only those who were parties to the illegal consideration for

¹ *Per* Sir J. Mansfield, C. J., in *Gibbs v. Merrill*, 3 Taunt. 307.

² *Lee v. Muggridge*, 5 Taunt. 36.

³ *Seton v. Seton*, 2 Brown, Ch. Cas. 616. The Lord Chancellor, in this case, expressed doubts whether a promissory-note for £.9500, given by a mother, and put into the hands of a trustee, as a provision for a child with which she was then pregnant, was sufficiently *nudum pactum* to be delivered up for want of consideration. *Vide* Chitty's account of the same case, p. 85, note c.

⁴ *Popplewell v. Wilson*, 1 Str. 263.

⁵ *Ridout v. Bristow*, 1 Tyrwh. 84; 1 Cr. and J. 231.

⁶ *Per* Lord Mansfield, 1 Cowper, 290; Lord Raym. 389.

⁷ *Ibidem*; *vide* also *Trueman v. Fenton*, 2 Cowp. 544; *Birch v. Sharland*, 1 T. R. 715; *Brix v. Braham*, 8 Moore, 261. In the first of these cases, the effect of a new security, in reviving a debt that would have been otherwise barred by a certificate, is fully argued. In the last case, a bankrupt who had, after his commission, but before his certificate, promised full payment to a creditor who had not proved under the commission, and had afterwards indorsed a bill to him in security of his debt, was found liable as indorser, the debt being held to be a sufficient consideration for the indorsement.

⁸ *Holliday v. Atkinson*, 5 B. and Cr. 502; 8 D. and R. 163.

⁹ *Vide* opinion of Wilmot, C. J. in *Collins v. Blantern*, 2 Wilson, 350.

which the bill or note was granted. The principle in such cases, which is, that courts of law must not give effect to rights founded on a transgression of the law, applies to the transgressors, who are precluded from suing upon the bill or note. But the bill or note is not altogether invalid; (for, as it is a negotiable document, the full right of which may be transmitted to third parties, free from objections against previous holders that do not appear on the face of it, indorsees, unless proved to have been parties to the illegal cause of granting it, cannot be affected by such objections. The original payee is liable to them by his indorsation, and the acceptor, in consequence of his signing a document capable of transmission to a third party. There are exceptions to this rule, which shall be afterwards noticed; but they are founded on special statute.

Under these limitations, it may be laid down, that no party can enforce payment of a bill or note granted or indorsed to him for a consideration, either criminal in itself, or prohibited by law. In this view, it may be doubted whether there is solid ground for the distinction laid down by some authorities¹, between *mala in se* and *mala prohibita*, to the effect of holding that the latter do not nullify a contract, unless nullity is the penalty inflicted by statute, but merely give a claim for the statutory penalty. This distinction has been denied², and apparently with reason; for, whatever the law prohibits must be considered as a transgression, with reference to those who are subject to it; and, therefore, courts of law should refuse action upon contracts founded on a violation of express laws, as much as on those which are criminal in themselves. The application of this doctrine shall be afterwards considered.

There are various contracts for which action is refused at common law, on one or other of the grounds now stated, whether the action be brought on bills or notes, or on any other obligation. 1. No obligation is good, when granted as an incentive to commit a crime. The rule of law is, "You shall not stipulate for iniquity³." The same rule strikes

¹ Blackstone, i. 57; *Witham v. Lee*, 4 Esp. 264.

² *Per* Heath and Rooke, J. in *Aubert v. Maze*, 2 Bos. and Pull. 374-5.

³ *Per* Wilmot, C. J. in *Collins v. Blantern*, 2 Wils. 350. The same principle was recognised in the case of *Lord Lovat v. Fraser*, 8th Feb. 1745, *Morr.* 9557,

against any obligation granted as an incentive to a breach of morality, as a bill granted for the price of prostitution¹. But, on the other hand, it is sustained when granted as an indemnity for past cohabitation², or as a provision for the offspring of an illicit connection³. It has been decided, however, that such a security is not valid, when granted to a prostitute⁴, or on account of an adulterous connection⁵. Another instance of

where the Court reduced a bond on the ground that it had been granted as an incentive to commit treason, though they afterwards altered the interlocutor, on a proof of facts which removed that objection.

¹ In *Walker v. Parkins*, 2 Burr. 1568, judgment was given for the defendant, on demurrer, in an action upon a bond for an annuity of £.60, given by him to a woman who lived with him, to be vacated if she quitted him, or lived with another man, which the Court held to be a stipulation that she was to lose the annuity if she became virtuous.

² This has been held in England in these several cases; *ex parte Cottrel*, 2 Cowper, 242, being a bond by a person to pay a certain sum to another man, in consideration of his marrying a woman who had lived with the obligor; in *M. Annandale v. Harris*, 2 P. Williams, 433, being the case of a bond of provision by a nobleman to a woman whom he had seduced, and to a child he had by her, but which had died before the action; in *ex parte Mumford*, 15 Vesey, 289, where a claim in bankruptcy was sustained on three promissory-notes granted by the bankrupt to the petitioner for damages and expenses, (for which an action had been raised,) for seducing his daughter; in *Turner v. Vaughan*, 2 Wilson, 339, being the case of an annuity of £.30 for life to a woman for past cohabitation; in *Hill v. Spencer*, Ambler, 641, where a bond of £ 50 *per annum* to a prostitute for her future maintenance was sustained; and in *Gibson v. Dickie*, 3 M. and S. 463, where effect was given to a bond for an annuity of £.30 granted in consequence of past cohabitation.

³ In the case of *Annandale*, already cited, the bond was intended partly as a provision to the child. The bond, also, in *Cottrel ex parte*, was intended, in part, for the same purpose. In Scotland, in the case of *Irvine v. Skene*, 7th March 1707, *Morr.* 6351, the Court refused to sustain it as a ground of nullity against a bond, that it had been granted by a mother as a provision to her adulterous child; and in the case of *Hamilton v. Bonamy and Hamilton*, 26th June 1765, *Morr.* 9471, they sustained a bond by a father under the same circumstances, so far as it was intended as a provision to his adulterous child.

⁴ *Whally v. Norton*, 1 Vern. 483, where an opinion to this effect was expressed by the Master of the Rolls, and *Matthew v. Hanburgh and Ux.* 2 Vern. 187. *Vide* also 1 Bell's Comm. 299.

⁵ In *Durham v. Blackwood*, 20th July 1622, *Morr.* 9469, the Court refused to sustain such a bond of aliment, even in so far as it was intended for the benefit of the issue. In *Ross v. Robertson*, 25th June 1642, the Court went to the other extreme, sustaining a similar bond for the sole benefit of the mother. But, in the later case of *Hamilton v. Bonamy and Hamilton*, note 3, they adopted what appears to be the proper distinction, sustaining such a bond so far

a bill annulled *ob turpem causam*, in a suspension between the original parties, occurs in a recent case¹. 2. A bond or other security affords no ground of action, when given in consideration of the grantee dropping a criminal prosecution², or procuring a pardon³, or suppressing evidence⁴. But such a bond

as designed for the offspring, while they set it aside with regard to the adulterous mother, *Vide* also the English case of *Priest v. Parrot*, 2 Vesey, 160.

¹ *Hamilton v. Main*, 3d June 1823, 2 S. and D. 356.

² In *Wallace v. Hardacre*, 1 Camp. 45, action was sustained on a bill taken as a substitute for a forged bill, (which was thereupon given up,) solely on the ground of there having been no bargain to stifle a prosecution for the forgery. In *Collins v. Blantern*, 2 Wilson, 349, action was refused on a bond taken as a substitute for a promissory-note, which had been granted in consideration of the grantor abandoning a prosecution for perjury. In *Edgecomb v. Rood and others*, 5 East. 294, the Court of King's Bench decided, that an agreement to discharge a misdemeanour was unlawful and ineffectual. It seems to have been held at one time, (*Johnston v. Ogilvy*, 3 P. Williams, 279; *Fellows v. Taylor*, 7 T. R. 475; *Dragge v. Iberson*, 2 Esp. 643, *per* Lord Kenyon,) that such an agreement was not void with reference to a misdemeanour. But the case of *Edgecomb v. Rood and others* decided the contrary. In Scotland, the same principle is applicable to crimes of every description. There is a case, *Grant v. Davidson*, 12th Aug. 1786, Morr. 9571, where the Court held it lawful for a kirk-session to transact a fine, which was recoverable by popular action under the Scotch act 1661, c. 38. But the Lord Ordinary had found, that the transaction was illegal, and his interlocutor appears to have been well founded; *vide* Bell, i. 299, note 2. In another case, *Lee v. Watson*, 20th May 1795, where a father-in-law had paid bills forged by his son-in-law, to save the latter from prosecution for forgery, he was not allowed to plead compensation for the sum thus paid, against a claim which his son-in-law had upon him under his marriage-contract, and which the son-in-law's creditors had sold to a third party who sued him upon it. There is a case not very reconcilable with the rule here laid down, *M'Leod v. Fraser*, 14th Dec. 1758, Morr. 9563, where a party had granted a bill for behoof of a third party for £.70, as the expenses of a criminal prosecution against him, on condition of the prosecutor, to whom the bill was granted, dropping the prosecution, *which was done*, (he being all the while quite aware of the purpose of granting the bill,) and yet was found entitled to his relief against the party for whose behoof it was granted. This decision appears to be contrary to the rule, *In turpi causa melior est conditio possidentis*. In a late case, *Kennedy v. Cameron*, 7th Feb. 1823, 2 S. and D. 192, the Court passed the suspension of a charge on a bill granted to induce a party to drop a prosecution for theft, even while the bill was in an indorsee's hands, the bill having been indorsed after the trial, (in which the pannel had been acquitted,) and the date of the indorsation being torn off.

³ *Stewart v. the Earl of Galloway*, 3d June 1752, Morr. 9465; *Norman v. Cole*, 3 Esp. 253, *per* Lord Eldon, C. J.

⁴ In *Pool v. Bonsfield*, 1 Camp. 55, Lord Ellenborough denied effect to an

or security has been sustained, when it is accepted by a party merely in satisfaction of his civil claims, (though these should arise from the delict of another party,) ¹ or when authorised by the Court as part of the punishment ², or when taken by an excise-officer in satisfaction of penalties which he holds a warrant to recover, provided his conduct is approved of by his superiors; it being held, in such a case, that satisfaction has been given to all concerned ³. In Scotland, the magistrates of a burgh, suing on the indorsation of a bill made to them by a debtor confined in their jail, for their indemnity in case of his making his escape, were found to have no good right; it being held, that such a transaction was illegal, as tending to make magistrates negligent ⁴. 4. Effect has been refused in England to a promissory-note granted to parish officers by the father of a natural child, in consideration of being relieved from its maintenance; this being held inconsistent with the

agreement by the payee of a bill to discharge it, on condition of his not being pressed in Court to answer the matters contained in an affidavit. In *Nerot v. Wallace*, 3 T. R. 17, the same decision was given on a writ of error from the Common Pleas, against an agreement by the friend of a bankrupt to give a sum to his creditors, if they would desist from examining him with regard to certain funds.

¹ In *Kaye v. Bolton*, 6 T. R. 134, an agreement by the friend of a bankrupt to pay his whole debts, on condition of the proceedings against him under a commission of bankruptcy being dropped, was sustained. In *Brett v. Close*, 16 East. 293, a person committed by the Court of Chancery for contempt, in respect of his not paying a certain sum as ordered, having afterwards granted notes to the creditor for payment of the sum with costs, on condition of his being liberated, the Court of King's Bench sustained action on the notes, holding that such a process of contempt was a civil process. In *Harding v. Cooper*, 1 Stark. 467, effect was given to an agreement by the father of a bankrupt, who was prosecuted for fraud, to pay the prosecutor 2s. 6d. per pound, with his costs in the civil proceedings, (after which the prosecution was dropped,) the dropping of the prosecution not being proved to be part of the agreement.

² In *Beal v. Wingfield*, 11 East. 46, this appears to have been the ground of judgment. In *Kirk v. Strickwood*, 1 N. and Mann. 275, where a party convicted of a misdemeanour was advised by the Court to settle with the prosecutor, and in consequence paid £.20, and granted a note for about £.19, including the costs of prosecution, in respect whereof only a nominal sentence was passed upon him, action was sustained on the note. *Vide* report in 4 B. and Ad. 421.

³ *Pilkington v. Green and another*, 2 Bos. and Pull. 151; *Sugars v. Brinkworth*, 4 Camp. 46.

⁴ *Shoolbred and others v. Osborne*, 18th June 1769, *Morr.* 9468.

English statutes, and with public policy¹. In a recent Scotch case², such an agreement was found ineffectual against a claim by the child, but the father's claim of relief against the kirk treasurer was reserved. 5. In England, where wagers are countenanced at common law, action is, however, refused on certain kinds of wagers, (and of course on securities granted in implement of them,) as being contrary to public policy³, or to the feelings or interests of a third person⁴, and for other causes. But our courts refuse effect to all wagers, on the sound principle, that courts of law were instituted solely for protection of real rights, and for the enforcement of serious contracts⁵. Even in England, it has been held that a judge may refuse to try a wagering question, except for the purpose of recovering money from the stakeholder⁶. 6. A bond or agreement, which has the effect of restraining the granter from marriage, has been found in England not to form a ground of action⁷. 7. The same rule is adopted,

¹ *Cole v. Gower*, 6 East. 110.

² Rankine, 7th Dec. 1833, 12 S. and D. 183.

³ *Vide Chitty*, 95, and cases therein cited. *Vide* also *Gilbert v. Sykes*, 16 East. 150, where action was refused upon a wager as to the life of Napoleon Bonaparte.

⁴ In *Da Costa v. Jones*, 2 Cowper, 729, a wager, as to the sex of the Chevalier D'Eon, was held to be illegal. *Vide* also *Ditchbourne v. Goldsmith*, 4 Camp. 152, and some other cases of wagers, in a note to the report of this case, and in *Chitty*, 75.

⁵ In an early case, *A v. B*, 9th Feb. 1676, *Morr.* 9505, the Court gave effect to a wager, though some of their number were against it, on the grounds which have been ultimately adopted; and, in another case, *Hope v. Tweedie*, 3d Dec. 1776, *Morr.* 9722, the Court appears to have recognised the legality of wagers in general, though they did not give effect to the wager then in question. But it is now finally decided, *Bruce v. Ross*, 26th Jan. 1787, *Morr.* 9523, affirmed on appeal, and *Wordsworth v. Pettigrew*, 15th May 1799, *Morr.* 9524, that wagers are not actionable. In the first of these cases there were two objections: 1. That no wager could be sustained; and, 2. That the wager in question was contrary to public policy. The decision was affirmed upon appeal on the first ground, as appears from Mr J. Buller's opinion, 3 T. R. 697, where he expresses a wish that the question were also reconsidered in England. Lord Mansfield, in 2 Cowp. 735, and Mr J. Ashurst, as well as Mr J. Buller, in 2 T. R. 615-16, express a decided opinion against the propriety of giving effect to wagers.

⁶ *Hasleton v. Jackson*, 8 B. and Cr. 221. *Vide* also *Bate v. Cartwright*, 7 Price, 540.

⁷ In *Low v. Fiers*, 4 Burr. 2225, judgment was arrested on a bond wherein

both in England and Scotland, with regard to all agreements stipulating rewards for bringing about marriages¹. 8. Though some restraints on natural liberty are ineffectual, and, therefore, illegal considerations of a bill or note, such as an obligation to perpetual banishment², or perpetual servitude³; yet it has been held that an engagement to work for hire, even during life, is effectual⁴. With regard to restraints of a different kind, viz. restrictions on the freedom of trade, it has been decided, that an engagement not to trade at all within this country is illegal and ineffectual; but that an agreement not to trade in a certain place or within a given distance of it is valid⁵. By the 5 and 6 Ed. VI. c. 16, and the 49 Geo. III.

the defendant had agreed to pay £.1000 to the plaintiff if he married any other woman than her; this being held to infer no obligation by either of them to marry each other. In *Hartley v. Rice*, 10 East. 22, judgment was given on the same ground, against a bet of fifty guineas, which the plaintiff was to lose if he married within six years.

¹ *Campbell v. Burns and Stewart*, 6th June 1676, *Morr.* 9505, Lord Fountainhall says, that this, which seems to have been the first process of the kind, moved "laughter;" but he does not mention how it was decided. In *Earl of Buchan v. Cochran*, Jan. Feb. and June 1698, *Morr.* 9507, 4505, a bond of this kind, granted for £.1000, had been found null by the Court of Chancery in England, as being *contra bonos mores*; but the creditor having charged upon it here, at least so far as regarded his expenses incurred in the debtor's business, the Court appointed him first to condescend on the particulars of those expenses. But it does not appear how the case was at last decided. The point was however settled in the case of *Thomson v. M'Kaile*, 14th Feb. 1770, *Morr.* 9519, being the case of a kind of promissory-note granted by the parents of a young man, payable on condition of his being provided by the payees with a suitable wife. The Court, after full discussion, found that such an obligation was *contra bonos mores*, and therefore could not support an action. In England, such bonds have been long discouraged. *Vide Drury v. Hooke*, 1 Vern. 412; *Duke of Hamilton and Ux. v. Lady Mohun*, 2 Vern. 652. *Vide* also *Chitty*, 95, and authorities there cited.

² *Wedderburn v. Monorgun*, 6th March 1612 *Morr.* 9453.

³ *Laird of Caprington v. Giddow*, 24th March 1632, *Morr.* 9454.

⁴ *Ersk. i.* 7. 62; *Reid*, 13th Feb. 1687, 1 Fountainhall, 439; 1 Bell, 302.

⁵ *Vide Hunlock v. Blacklowe*, 2 Saunders, 156, note 1; *Mitchell v. Reynolds*, 1 P. Williams, 189; *Cheesman v. Naish*, 2 L. Raym. 1456; and *Davis v. Mason*, 5 T. R. 118, which go to establish both of these points. The last case was an agreement of this kind by a person on being admitted as assistant to a surgeon apothecary. *Vide* also 4 East. 140, and 2 Chitty's Reports, 407, both noticed in Chitty, 94, a. In Scotland, in the case of *Stalker v. Carmichael*, 15th Jan. 1735, *Morr.* 9455, where, in a contract of copartnership between two persons to carry on bookselling in Glasgow, to last for three years, it was stipulated, that either of them declining to renew the partnership after that period

c. 126, which extends it to Scotland, and likewise applies it to a greater number of cases, all agreements, bonds, or engagements of any kind, concerning the sale of offices connected with the administration of justice, or in the gift of the Crown, or any of the other offices described in these two statutes, are void as respecting the parties between whom the agreement was made¹. Analogous to this case, in point of principle, is an agreement, for gain, to recommend a person to an office in the army. So far does the law of England carry its aversion to such transactions, that² relief was given in equity against a promissory-note granted by a subaltern to his colonel for procuring him promotion, although the amount of the note was previously in the hands of the Sheriff, who had levied it by an execution.

10. All contracts made with an alien enemy during war are illegal. It has therefore been decided in England³, that a bill drawn during war, by an alien enemy, on a merchant in London, and indorsed by the drawer and payee to a British subject then residing in an enemy's country, but who was held to be privy to the original contract, could not produce action at the indorsee's instance, even on the return of peace. On the same principle, it has been decided in Scotland⁴, that, when bills accepted by a British subject are transferred by the holder, an alien enemy, to another British subject, who receives them after he knows of the declaration of war between the indorser's government and this country, the latter cannot maintain action on them; it being held, that, by receiving bills which he knows to be enemy's property, he has made himself an instrument for enabling the enemy to sue

debarred from trading as a bookseller in Glasgow, (that city being then judged too narrow for two booksellers,) the Court, in a reduction of the contract, sustained this clause, as "not contrary to the liberty of the subject." As to the limits of such an agreement, *vide* *Young v. Timmins, Tyrwh.* 225, where it was held, that an agreement to restrain an individual in a particular trade, but without an adequate consideration, and also a note which he had granted for damages arising from breach of agreement, were void.

¹ This subject, as well as the legality of selling offices in Scotland at common law, is fully discussed in *Brown's Law of Sale*, 116-30.

² *Whittingham v. Burgoyne*, 3 Anstr. 900.

³ *Willieson v. Pattieson and others*, 7 Taunt. 459. *Vide* also *Ogden & Peele*, 8 D. and R. 1.

⁴ *Johnson and Wright v. Goldsmith and others*, 15th Feb. 1809, F. C.

in our courts. In a subsequent case¹, where the acceptor of a bill payable to an alien enemy was charged for payment by an indorser, who admitted that he held the bill for the payee's behoof, the Court would not even entertain the claim, so far as to order caution for its amount till a peace, but simply sisted procedure. A similar opinion and judgment is said to have been given in another case². In all these cases the British indorsee was privy to the original illegality of the contract, and therefore his right was held to be as invalid as that of the original creditor; and, in the first case, he was not even allowed to sue upon it after the return of peace. The place where the bill is drawn, and the names of the parties, will be often indications of the true nature of such a transaction. But if it does not appear that the indorsee knew of the original payee, or the person from whom he took the bill or note, being an alien enemy, he would seem to have a good right of action, since the exclusion of the original parties is founded merely on their peculiar and personal character of alien enemies, which does not infer total nullity of the obligation. It has been farther decided, that a British subject in an enemy's country, for instance a prisoner of war, may validly grant a bill or note to another British subject resident there³, or to any other person not an enemy⁴. Even if such a bill or note is indorsed by the payee to an alien enemy, in the ordinary course of negotiation, for instance, by an English prisoner in France to a French banker; or if a prisoner should draw a bill on a person in this country payable directly to an alien enemy⁵, the title of the latter is held to be good; so that, although he cannot sue on it during the war, he, or a person acting as his trustee⁶, may do so after the return of peace⁷. This rule, however, in so far as regards the indorsee's title, seems to have been rested on the circumstances of the case⁸, the nego-

¹ *Carron v. Cowan and Co.* 28th Nov. 1809, F. C.

² *Wright v. Hutcheson*, 17th Jan. 1810, F. C.

³ *Antoine v. Moirhead*, 6 Taunt. 237.

⁴ *Houret v. Morris*, 3 Camp. 303.

⁵ *Daubuz v. Morhead*, 6 Taunt. 332.

⁶ *Ibid.*

⁷ *Antoine v. Moirhead*, note 3.

⁸ *Per Gibbs, C. J.*, in *Antoine v. Moirhead*, and also in referring to it in the subsequent case of *Willieson v. Pattieson*, 118, note 3.

tiation of such bills with French bankers, as well as the drawing of them, being then necessary for the support of English prisoners in France; and, unless there is such a case of necessity, it does not appear that the indorsation of a bill or note originally valid, to an alien enemy, can give him a good title, on which he may recover even after the return of peace. That event may revive the holder's right of action on a good title, although, so long as he remains an alien enemy, it is suspended, or rather transferred to the hostile government¹, but it cannot validate a bad title. In a case², of four bills drawn by an English prisoner then in France, on a person in this country in favour of a Frenchman, (which, as they stood originally, were invalid under a temporary act, 34 Geo. III. c. 9, § 2, not applicable to the other cases already cited,) Lord Ellenborough, in an action against the drawer, (the drawee having refused to accept them,) held, that though the bills were void originally, a promise of payment made by the drawer during the subsequent peace was binding. This decision appears to proceed on a specialty of English law, according to which even a verbal promise is binding, if made on a good consideration, such consideration being held to exist in this case. In Scotland, nothing short of a written obligation could have been admitted, and this would have been binding, whether made on a consideration or not.

11. Parties concerned in smuggling have no claim either for delivery of the smuggled goods, or for the price of them when delivered, and, consequently, cannot sue on a bill or note granted on that account. *First*, No party to a contract for smuggling goods can have a legal claim under it³. But a

¹ *Per* Gibbs, C. J., in *Antoine v. Moirhead*, 119, note 3.

² *Duhamel v. Pickering*, 2 Starkie, 90.

³ On this ground action was refused to a Scotsman settled abroad, for the price of goods sold by him to be imported into Britain, in the cases of *Cantley v. Robertson*, 11th Feb. 1790, *Morr.* 9550, and *Young and Co. v. Imlach*, 7th July 1790, *Morr.* 9551. The same rule was adopted with regard to a foreigner concerned in a smuggling contract, in the case of *Nisbet's Creditors v. Robertson*, Jan. 1791, *Morr.* 9554, being a reduction of an heritable bond and infeftment for the price of smuggled goods, brought against the assignee of the foreign creditor, who was held liable to the same objection as his cedent. Similar decisions were given against foreign traders, on the ground of their being accessory to smuggling, in the English cases of *Clugas v. Penaluna*, 4 T. R. 466; *Waymell v. Read*, 5 T. R. 599, and various other cases, cited in a note

person settled abroad, whether foreigner or native, has an action here for the price of goods sold and delivered by him abroad, though he should know that they are to be smuggled into this country, unless he was a party to the smuggling¹. *Secondly*, A party buying contraband goods in this country, when he knows that they are contraband, cannot enforce delivery of them, or claim damages for breach of contract². *Thirdly*, Although it was once held, that a smuggler who had sold goods within the country after they were smuggled, had an action against the buyer, on bills granted for the price³, the sounder opinion appears to be, that he has not⁴. There

to Holt's N. P. C. 107. The same principles were held equally applicable to foreign traders and natives settled abroad, though the actual pursuers were Scotsmen born, in the cases of Cullen and Co.'s Attorney v. Philp, 15th May 1793, and Reid and Parkinson v. Macdonald and others, 15th May 1793, Morr. 9554-5.

¹ In the case of Holman v. Johnson, 1 Cowper, 341, Lord Mansfield sustained action at a foreigner's instance, for the price of goods sold and delivered by him abroad, with the knowledge that they were to be afterwards smuggled into Britain, distinguishing between this knowledge and a direct concern in the smuggling, *e. g.* if the plaintiff had taken a share in running the goods into this country, contrary to the revenue laws. The same decision was given in favour of foreign merchants, (natives of Scotland,) in the cases of Walker v. Falconer, 27th Feb. 1759, and More and Irvine v. Steven, 13th Nov. 1765, Morr. 9543-4; and an opinion to the same effect was expressed in the preceding case of Cullen and Co. v. Philp, 120, note 3. In Greig's Trustees v. Davidson, 13th Jan. 1789, Morr. 9550, the Court at first decided in favour of the foreign merchant, (a Scotsman,) under circumstances which indicated that he was a party to the smuggling. But on a petition, they expressed doubts of their judgment, and the case was compromised.

² Scougal and others v. Gilchrist, 16th Nov. 1736, Morr. 9537; Cockburn v. Grant, 11th Nov. 1741, Morr. 9539.

³ In Wilkie v. Macneil, 6th Nov. 1740, Morr. 9538, action was sustained for the price of smuggled (imported) goods bought in this country, though they were seized after delivery. In Commissioners of the Customs v. Morrison, 27th Nov. 1723, Morr. 9533, being a suspension by the buyer against the seller of run goods, of a charge given on a bill for the price, (in which the Commissioners of the Customs sisted themselves, in order to get the general question tried,) the Court, after a full argument, found, "that action on the bills in question, for "the price of run goods, though bought as such, is competent."

⁴ 1 Bell, 307; Brown on Sale, 143-5. In Duncan v. Thomson, 8th Feb. 1776, Morr. App. 1, a charge on a bill for the price of smuggling goods was suspended. But this appears to have been done on the ground that both parties were partners in the act of smuggling; or, according to the judgment of the Court, that the action "is brought between smugglers for implement of a "smuggling contract." In a subsequent case, Maclure and Macree v. Pater-

is ground here for the operation of the principle already explained, that, where an act is prohibited by statute, as the sale of such goods is, it does not become lawful on payment of the penalties imposed for it, but is an act of disobedience to the Government, to which, therefore, courts acting under the authority of that Government cannot give effect, more than to a breach of natural law. To refuse action for the price, is only to adopt the converse of the rule which has been established, that the buyer, though he has paid the price, cannot compel delivery of the goods. There is an exception to this doctrine in the case of an old act of the Scotch Parliament¹, prohibiting members of the College of Justice from buying property which is the subject of a plea before the Court of Session. Under this act, it has been settled, that the transaction, though prohibited, may be enforced by action, and that the only penalty is deprivation of office, imposed by the statute on those who contravene it². But it may be doubted whether effect would now be given to such transactions, if the question were raised for the first time. Although the rule now stated appears to be the proper one in an action by the importer of smuggled goods for the price of them, it has been decided³, that it does not apply in an action by a party, who has bought the goods from the importer, against a third party to whom he has sold them, though the goods had not paid the duties, and were seized, as having been delivered without a permit. If such sale and delivery has been prohibited, it may be doubted whether, according to the principles already stated, any party can maintain action under the contract. But the Court held, that such a rule would introduce great embarrassment into retail trade, by enabling every customer to urge the objection. For the reasons already mentioned, no action on a bill

son, 26th Feb. 1779, *Morr.* 9546, which was an action on a note for the price of smuggled goods, it appeared that the purchasers had been concerned with the sellers in the direct act of smuggling, and therefore the decision, which refused action on the note, may probably have gone on the general ground of a smuggling contract, although it was likewise argued that a party selling smuggled goods after they were imported could not maintain action for the price. The question, therefore, as to the competency of such an action, does not appear to be as yet settled.

¹ 1594, c. 220.

² *Brown on Sale*, 195.

³ *Maclean v. Sword*, 5th Dec. 1786, *Morr.* 9549.

or note, though granted originally for contraband goods, can be refused at common law to an indorsee, unless he is proved to have been concerned in the unlawful transaction¹. But a note indorsed to a French house by a party residing in England, for payment of French silks, while their importation was prohibited by 50 G. III. c. 55, § 1, though the indorsee of the note was not the importer, was decided, in respect of his concern with the transaction, to be not actionable².

12. No bill or note granted by a bankrupt as a preference to particular creditors, in order to induce them to concur with the other creditors in a proposal of composition, can produce action to the parties receiving it. This has been decided in a number of cases in England³, chiefly on a principle, which is applicable also in Scotland, viz. that through such a transaction a fraud has been committed on the other creditors, to induce them to accede to the composition, by leading them falsely to believe, that the preferred creditor has accepted it in full of his debt, and has taken the same security for it with them. Another reason is, that the surplus payment to the favoured creditors is made from the common fund, and that the creditors are thereby in part defrauded of it. The doctrine has been likewise resolved into another principle, viz.

¹ This was decided in *Richard and Brock v. Brackenridge*, 20th Feb. 1793, *Morr.* 1523, and *Bell's Cases*.

² *Billard v. Hayden*, 2 C. and Pay. 472.

³ *Cockshott v. Bennett*, 2 T. R. 783; *Jackson and another v. Lomas*, 4 T. R. 166; *Bryant v. Christie*, 1 Starkie, 329; *Leicester and another v. Rose*, 4 East. 372; *Wellis v. Girling*, 1 Brod. and Bingh. 447; *Knight v. Hunt*, 5 Bingh. 432; *vide* *Britten v. Hughes*, 5 Bingh. 460. The first, third, and fifth of these cases were actions on bills or notes. In the case of *Leicester v. Rose*, the doctrine now stated was held to be equally applicable, whether the private agreement was to pay the favourite creditor a larger sum, or merely to give him a better security. In *Seager v. Billington*, 5 C. and Pay. 456, the foregoing principle was applied, by precluding a creditor who, in acceding to a composition by a bankrupt, had represented his debt as amounting to £.65, from suing him afterwards on another debt, which he had not then mentioned. In *Haywood v. Chambers*, 5 B. and Ald. 753, the plaintiff was non-suited in an action on a promissory-note granted to him by the defendant, (after a commission of bankruptcy had been issued against him,) for a pre-existing debt, and while the plaintiff was a commissioner; the Court holding, (though it was not proved that undue means had been used to extort the note,) that the bankrupt could not be considered as a free agent with reference to a commissioner, and that the granting of the note had an improper tendency to warp the latter in the discharge of his duty.

that the benevolent intention of the creditors to give the bankrupt the benefit of a certain composition, is frustrated by the rapacity of a particular creditor. This last principle has been applied to a different case from that of a composition contract, in one instance¹, where a friend of the defendant having agreed, on his account, to give the plaintiff £.70 for certain goods in a house which he was leaving, and which the defendant was to occupy, but the plaintiff having also taken a promissory-note from the defendant for £.15 more on the same account, the Court of King's Bench held, that he could not maintain action on this note, as it was a fraud on the defendant's friend, who would not probably have given the £.70, if he had not been led to believe that it was the full price of the goods. The rule, on whichever of these principles it rests, is equally applicable in the case of a private composition-contract, or of one entered into in Scotland under the authority of the bankrupt statute. In one case², where a creditor, after signing a deed of composition with the other creditors, got bills for his composition from the bankrupt, subscribed both by him and by a friend, the effect of which was to give him better security than the other creditors, the Court of King's Bench sustained the bills, as not being granted *in fraudem* of the other creditors. But the authority of this case has been since questioned³; and Courts will be always inclined to suspect, that such arrangements formed part of the original understanding between the bankrupt and the preferred creditor, though they may, in appearance, have taken place after the composition-contract was concluded. In a case already mentioned⁴, the Court refused to give effect to such a security, though the composition-contract (into which the favoured creditor, in consideration of his obtaining it, endeavoured to entice the other creditors,) never took effect; holding, that as it was fraudulent at first, it could not become valid by what took place afterwards.

¹ Jackson v. Duchaire, 3 T. R. 551.

² Feise v. Randall, 6 T. R. 146; Bayley, 507; Chitty, 96.

³ Leicester v. Rose, p. 145, note 3. Reference was made, *contra*, to a previous decision, Wheelwright v. Jackson, 5 Taunt. 109, which, however, was held to be accounted for on another ground. *Vide* argument for the defendant, and opinion of the Court, in Wellis v. Girling, 124, note 3.

⁴ Wellis v. Girling, 1 Br. and Bingh. 447.

It follows, from what has been stated, that at common law such an objection could not be made against a bill or note, unless in the hands of a party privy to the fraud. In England, such securities, when granted to a creditor as an inducement to assent to the bankrupt's certificate under a commission of bankruptcy, are declared by 5 Geo. III. c. 130, § 10, and 11, and by 6 Geo. IV. c. 16, § 125, to be null and void; and, consequently, it has been held¹, that bills or notes so granted are null, even in the hands of a *bona fide* onerous holder. But, on the other hand, it is held, that a bill or note will be good to such a holder, if granted only to induce a creditor not to oppose the bankrupt's certificate, although it would not be available to the creditor². In Scotland, the bankrupt act 54 Geo. III. c. 137, § 61, declares, with reference to any compromise between the bankrupt and particular creditors, made to induce them to concur in his discharge, that every "such private transaction" is unlawful, and no action shall lie upon any bill, or other "security, granted in consequence thereof." In this special case, therefore, a statutory sanction has been added to the rule of common law. In a recent case³, a bill granted in fulfilment of a transaction of this kind by the bankrupt and his wife and children, was found ineffectual to the creditor exacting payment. The same doctrine was since enforced⁴, in an action of repetition by the bankrupt and his cautioners, of the amount of bills which had been indorsed to a third party, and recovered by him, the maxim, *melior est conditio possidentis*, not being held applicable to such cases of extortion⁵, both on the ground of the statute, and on the principles of common law. Whether bills or notes granted on account of such transactions would be good to *bona fide* onerous holders, does not appear to have been decided. But it has been decided⁶, that

¹ *Birch v. Jervis*, 3 C. and Pay. 379.

² *Murray v. Reeves*, 8 B. and Cr. 421.

³ *Riddel v. Christie*, 20th Nov. 1821, 1 Shaw, 151.

⁴ *M'Dowall v. Kerr*, 14th Feb. 1828, 6 Shaw and D. 546, F. C.

⁵ *Vide also Arrol and Cook v. Montgomerie*, 24th Feb. 1826, 4 S. and D. 499, F. C. The following are analogous cases, but not relating to bills; viz. *Jameson v. Baxter*, 15th Feb. 1815, F. C.; *Turner v. Caddell and Sons*, 15th Feb. 1822, 1 Shaw, 325, F. C.

⁶ *Lewis v. Jones*, 6 Dowl. and Ryl. 567. *Vide 4 B. and Cr. 506*, for the same report.

the subscription by the creditor in a note of an agreement by him and other creditors, to take from the granter a note for 5s. *per* pound, in full of the original note, excluded his claim on it against the indorser, who had signed it for the maker's accommodation, and it was held incompetent for him to prove, by parole evidence, that he had been induced to sign this agreement, by a promise of the indorser to pay him 15s. *per* pound, or that his agreement was conditional of the other creditors acceding, seeing these allegations were contrary to his written agreement.

A note for a composition of 5s. signed for a bankrupt by a third party, under an arrangement that all the creditors should concur in accepting the composition, was found in England, in consequence of the non-concurrence of one creditor, not to be capable of being enforced by the creditor to whom it had been given, against the granter¹. But it would have been good to a third party, who was not privy to the cause of granting it.

It has been decided², that a bill granted for the price of a vessel, in consideration of a sale which was null under the registry acts, for want of a regular vendition, could not be enforced by the seller, though the buyer had been in possession of the vessel, and had paid part of the price. The Court also found, that as the transaction was null *ab initio*, the seller was liable to repeat partial payments, and the buyer to account for the profits which he had drawn from the vessel. In an earlier case³, it was decided, that the acceptance of an offer to sell a ship, (though the offer did not recite the certificate of registry in terms of the statutes,) bound the purchaser to pay the price, a regular vendition having been previously tendered to him, and refused; and, in another case⁴, a similar decision was given under the same circumstances, in favour of the validity of bills for the price of a ship sold by *missives*. In the last of these cases, the Court held, that the purchaser was

¹ *Enderby v. Corder*, 2 C. and Pay. 203, *per* Best, C. J., contradicted by the verdict of the Jury, but confirmed afterwards by the opinion of the Court of C. P.

² *Carmalt v. Haggarty*, 11th Feb. 1823, 2 Shaw, 199.

³ *Wilson's Trustee v. Miller*, 2d Dec. 1808, F. C.

⁴ *M'Lachlan v. M'Innes*, 22d Nov. 1822, 2 S. and D. 30.

barred, *personali exceptione*, from pleading the registry acts, as a regular vendition had been tendered to him and refused. But it may be doubted, whether it was not *pars judicis* to enforce these acts ; and it does not seem consistent with them to give any effect to such agreements of sale, since they declared, not only that all transfers, but that all agreements to transfer, in which the statutory requisites are not observed, shall be null and void ¹. In a recent English case, however, where there was reason to presume that the vendee of a vessel had drawn the profits of it, though it was held that he had got no valid conveyance, the Court of Common Pleas decided, notwithstanding, that there was a sufficient consideration to sustain the bill granted by him for the price ².

There are other transactions declared illegal by statute, which, consequently, exclude the parties concerned in them from maintaining action upon any bill or obligation arising out of them. Among these are the sale of any quantity of spirits, to the amount of less than 20s. at one time, on credit ³ ; a horse-race for a plate under £.50, which is de-

¹ The late statute, 6 Geo. IV. c. 110, § 30, enacts, that transfers shall be made only by bill of sale, or other written instrument, reciting the certificate of registry, and that otherwise "such transfer shall not be valid or effectual for any purpose whatever, either in law or equity." It excepts, however, the case of a mistake in the recital, if the identity of the vessel is sufficiently ascertained by the instrument of sale.

² *Gascoyne v. Smith*, 1 Yonge and M'Lellan, 346.

³ This is declared illegal by 24 Geo. II. c. 40, § 12, which enacts, that no person shall be entitled to maintain action for such a debt. In *Scott v. Gilmore*, 3 Taunt. 226, where the plaintiff had got a bill from the drawer, partly for money lent, and partly in consideration of spirits sold to an amount below 20s. at one time, the Court of Common Pleas, in an action against the acceptor, held, that the bill was not effectual to the plaintiff, even for the lent money. It may be doubted whether this doctrine would be admitted to the full extent in Scotland, seeing that the illegality of consideration appears properly to be a personal exception against the party concerned in it, which ought not, therefore, to operate, unless in so far as the consideration is illegal. Indeed, this principle appears to be adopted in the English courts of equity, it being held there, "that when the consideration consists of two parts, one bad, and the other good, the bill should stand to what is good." *Ex parte Mather*, 3 Ves. 343. In *Binnyeat v. Hutchinson*, 5 B. and Ald. 241, which was an action for a tavern bill, furnishings of spirits below 20s., were struck out. In a case at Nisi Prius, *Spencer v. Smith*, 3 Campb. 9, which was an action by a publican, on a bill granted to him by a recruiting sergeant, for spirits furnished for behoof of the recruits and others, to be consumed out of his house, Lord Ellen-

clared illegal by the acts (apparently applicable to Scotland) of 13 Geo. II. c. 19, and 18 Geo. II. c. 24; the sale of shares in the state lottery less than one-sixteenth, or of less than the whole chance upon each share or ticket¹; an engagement by a person, not possessed of stock, to pay or compound differences occasioned by the rise or fall of stocks²; it being decided that promissory-notes, in so far as granted for the share of profits arising from such an illegal transaction, could not be ranked on the granter's estate³, and that even the indorsee of a bill granted on a similar account could not claim on it, when he was in circumstances that rendered him

borough decided, "that the act did not extend to invalidate a security so given." But the Court of Common Pleas decided the other way in the preceding case of *Scott v. Gilmore*, on the ground that, though the statute does not expressly void the security, it declares the consideration illegal, which must exclude the taker of the security from an action upon it. The same rule has been followed in Scotland, by refusing action on a bill granted for the amount of spirits so furnished; *Russell v. Russell*, 6th July 1808, 1 Bell, 233, note 9. In a late English case, *Crookshank v. Rose*, 5 C. and Pay. 19, where a bill for £.10, 7s., and a note for £.10 : 3 : 6, had been granted for an account composed of board and lodging, and of furnishings of spirits, and the latter did not amount either to the sum in the bill or that in the note, indefinite payments previously made were allowed to be imputed to the spirits, (it being held that the statute merely prevented recovery of such a debt, not that it was void,) and the plaintiff was allowed to recover on one of the securities, viz. the bill for the balance. The other security being held to be granted partly for spirits, must, in terms of *Scott v. Gilmore*, have been held altogether void. It has been held, *Jackson v. Atrill*, Peake's C. N. P. 180, that the act does not apply to furnishings made by one spirit-dealer to another, as its object was only to prevent tipping in the consumers of spirits.

¹ 22 Geo. III. c. 47, *Deer v. Shee*, 2 T. R. 617. In the case of *Seddon v. Stratford*, Peake, 215, where the plaintiff sued on a promissory-note granted for such a transaction, having indorsed the note for behoof of the defendant, in the full knowledge of the consideration, and consequently been obliged to pay the amount to a subsequent holder, Lord Kenyon held, that as the defendant would have been obliged to pay the note at any rate to the previous holder, he could not resist this claim by the plaintiff, who had paid it for him. But, was it not a good answer to the plaintiff's claim, that it had arisen from his accession to an illegal contract? It was held, that the plaintiff had derived a new title by an indorsation from the previous holder, who had come honestly by the note. But could he validly acquire this title, when he was aware of the previous illegality?

² Prohibited by 7 Geo. II. c. 8. In *Faikney v. Raynons*, 4 Burr. 2070, the law on this subject is taken for granted, though it was held not to apply in the actual case, for a reason to be afterwards mentioned. *Vide* also *Steers v. Lashley*, 6 T. R. 61, and *Thomas v. Newton*, 2 C. and Pay. 606.

³ *Ex parte Bulmer*, 13 Ves. 313.

liable to the same exceptions with the original holder¹; private copartnerships for sea-insurance²; insurance on ships or lives by parties who have no interest in them³; trading against the charter of the East India Company⁴, or of the Russian Company⁵; the sale of a vote, or bribery at an election⁶; a simoniacal paction⁷; an insurance in the lottery⁸, or a contract to ransom a British ship, or goods on board of a ship which shall be captured by an enemy⁹; or a bill for money expended by the payee in conducting an unlicensed theatre¹⁰.

It has been decided, both in Scotland and in England, that a bill or note for apprentice-fee, not mentioned in the indenture of apprenticeship, (so that the indenture may be written on a stamp conformable to it,) cannot produce action

¹ *Brown v. Turner*, 7 T. R. 630. This case shall be afterwards considered with reference to another point, viz. the effect of indorsation after the term of payment in rendering the indorsee liable to the same objections with the indorser.

² 6 Geo. I. c. 18; *Aubert v. Maze*, 2 Bos. and Pull. 371.

³ 19 Geo. II. c. 37; *vide Kent v. Bird*, 2 Cowper, 583; also *Roebuck and another v. Hammerton*, 2 Cowper, 737, where this act was applied to a wager policy regarding the sex of the Chevalier D'Eon.

⁴ *Lightfoot v. Tennant*, 1 Bos. and Pull. 552.

⁵ *Grose v. Le Page*, Holt Cases, 105, who has a learned note subjoined to this report with regard to the law of *pactum illicitum*. The objection in question is founded on an English statute, 10 and 11 Wil. III. c. 6, which appears to be extended to Scotland by the Act of Union, Art. 6, wherein it is declared, that all restrictions and regulations of trade which had existed in England before the Union, shall extend to Scotland.

⁶ *Sulston v. Norton*, 3 Burr. 1235; the *King v. Pitt*, 1 Bl. 380; in both of which cases the bribery was held to be unlawful, though it was said not to have had the effect of corrupting the voter.

⁷ *Vide Morr.* 9578-83.

⁸ *Vide* 1 G. IV. c. 72, § 35, and previous statutes regarding lotteries; also *Wyatt v. Bulmer*, 2 Esp. 537, where the rule laid down in the text is taken for granted, though it was held not to be applicable to the plaintiff, in respect he was an onerous indorsee to a promissory-note which had been granted for such a transaction.

⁹ Prohibited by 22 Geo. III. c. 25, § 1, and 45 Geo. III. c. 72, the last of which declares all bills, bonds, &c. granted in consideration of such a contract, to be absolutely void, except, however, in a case of extreme necessity, to be judged of by the High Court of Admiralty. In the case of *Webb v. Brooke*, 3 Taunt. 4, action was refused on a bill granted on account of such a contract, the plaintiff being held to be directly concerned in the transaction.

¹⁰ *De Bagnis v. Armstead*, 10 Bingh. 107.

or diligence at the payee's instance, in consequence of the 8 Ann. c. 9, § 39, which enacts, that in such a case the agreement of apprenticeship shall be void, there being thus no consideration for the bill or note. This has been decided in a case¹, where it was held, that the master could not enforce a note for apprentice-fee, to the effect even of recovering the sum expended on the apprentice's maintenance; and, on the same ground, a charge on a bill granted for apprentice-fee, was suspended in Scotland². In another case³, which was a reduction of bills granted for apprentice-fee, on this ground *inter alia*, the Court repelled that reason of reduction, as the apprentice-fee had been ultimately marked on an extract of the indenture, and the corresponding duties paid, holding that this was sufficient, (in terms of the stamp-acts of that period,) even when done after the apprentice's death.

There are two species of illegal transactions which require a more detailed examination, viz. gaming debts, and usurious debts.

1. Gaming was early discountenanced in Scotland, by the act 1621, c. 14, which, on a narrative of the evils that ensue "upon carding, dycing, and horse-races," 1st, Imposes a penalty on innkeepers, &c. who permit persons to play at cards or dice in their houses, and declares that it shall not be lawful to play in any private house, except where the master of the house playeth; 2^{dly}, provides, That "if it shall happen to any man to win any sum of money at carding or dicing, attour the sum of 100 merks, within the space of twenty-four hours, or to gain at wagers upon horse-races, any sum attour the said sum of 100 merks, the superplus shall be consigned, within twenty-four hours thereafter, in the hands of the thesaurer of the kirk, if it be in Edinburgh, or in the hands of such of the kirk-session of the country parochines, as collects and distributes money for the poor of the same; to be employed always upon the poor of the paroche where such winning shall happen to fall out; 3^{dly},

¹ Jackson v. Warwick, 7 T. R. 121.

² Donaldson v. Fulton, 14th Feb. 1754, Morr. 587.

³ Shepherd v. Innes, 19th Nov. 1760, Morr. 599.

“ To the effect that either exesse in play may be thus restrained, or, at the least, excessive winning may be employed as said is,” warrant is given to sheriffs, magistrates of burghs, and justices of peace, to pursue for the foresaid excess of such winnings ; or, if they should not do so, after being informed, it is provided, that any private informer shall have an action against them for double the sum, one half to go to him, and the other to the poor. This act does not declare such winnings unlawful¹, but, on the contrary, the last clause implies, that the excess of them above 100 merks is to be a source of revenue to the poor. It does not, therefore, appear that securities granted for such winnings would have been null, under this act, even in the hands of parties privy to the cause of granting them. In one case², the Court considered this act to have been in desuetude in time past. But they declared that they would enforce it in future ; and, accordingly, it has been enforced in several subsequent cases³. As the law has been now settled with regard to wagers, action would not be sustained on any wager, either as to horse-racing or any of the games mentioned by this act. But, if the money won was either paid, or a security granted for it, then, according to this act, the amount beyond 100 merks Scots would become the property of the parish where the winning took place. No security, therefore, granted for

¹ *Vide* Opinion of the Court in *Maxwell v. Blair's Trustees*, *Morr.* 10590.

² *Straiton v. the Laird of Craigmillar*, 19th July 1688, *Morr.* 9506.

³ In *Ramsay v. Grant*, 9th Feb. 1711, *Morr.* 10551, the kirk-treasurer having appeared in a process by the creditor in an heritable bond, to claim the excess of it above 100 merks, as having been won at cards, the Court sustained his title, and allowed the cause of granting the bond to be proved by witnesses. In the previous case of *Straiton*, note 2, they had found proof relevant only by writ or oath. In *Maxwell v. Blair's Trustees*, 14th July 1774, and 15th June 1775, *Morr.* 9522 and 10580, which was an action on a bill for £.150, granted for the balance of £.210 won upon a horse race, the Court held the act 1621 to be in observance ; and, in a competition between the parish where the race began, that where one of the parties had given up, and that where the other had terminated the race, they decided, under the act, that the first parish was entitled to the money. It was objected in this case by the representatives of the granter of the bill that it was null, in respect of the 9 Ann. (to be immediately noticed,) which, it was contended, in so far repealed the act 1621. But the Court held then, contrary to what is now settled, that that act did not extend to Scotland.

money thus won, was annulled; the act merely authorised a new party to sue upon it. But the law as to such securities, (though not as to the other matters provided for by the act,) was changed by 9 Ann. c. 14, which has been long held to extend to Scotland. This statute, (besides certain provisions authorising any person who shall lose money to the amount of £.10, or, failing him, any informer, to recover it from the winner, who is to be compelled to answer on oath as to the money won by him, as also several provisions for repression of deceitful gaming and of gaming quarrels,) enacts, “ That all notes, bonds, bills, judgments, mortgages, “ or other securities or conveyances whatsoever, given, grant- “ ed, drawn, or entered into, or executed by any person or “ persons whatsoever, where the whole, or any part of the “ consideration of such conveyances or securities shall be for “ any money or other valuable thing whatsoever, won by gam- “ ing or playing at cards, dice, tattles, tennis, bowls, or other “ game or games whatsoever, or by betting on the sides or “ hands of such as do game at any of the games aforesaid, or “ for the reimbursing or repaying any money knowingly lent “ or advanced for such gaming or betting, as aforesaid, or “ lent or advanced at the time and place of such play to any “ person or persons so gaming or betting as aforesaid, or that “ shall, during such play, so play or bett, shall be utterly void, “ frustrate and of none effect, to all intents and purposes “ whatsoever; any statute, law or usage to the contrary there- “ of, in any wise, notwithstanding.” The statute likewise provides, that, in case of conveyances to affect lands granted for such a cause, the granter shall forfeit the lands in favour of the person who would have succeeded to them on his death. This act undoubtedly cuts off all action on bills or other securities therein described, whether granted in whole or in part for a gaming consideration¹, so long as they are in the hands

¹ This was decided in *M'Coull v. Braidwood*, 5th March 1767, *Morr.* 9518, where a charge on a bill for £.8, by the creditor against the granter, was suspended, on the ground that it was given partly for money won at play; it being thus held, (as the circumstances of the case imply,) that the act of Anne, though it allows play for any sum below £.10 paid in money, annuls all securities for whatever sum, and that equally, whether gaming is altogether, or only in part, the consideration of the security. At the same time, there was in

of parties who were privy to the cause of granting them¹. Its effect against the *bona fide* indorsees of such bills or notes shall be considered along with the case of *bona fide* holders of bills or notes granted for usurious considerations, and other securities declared null by statute. It has been decided in one English case², with regard to money lent at the time and place of play, that an action for the debt is competent, though not on a bill granted for it; it being held, that, though the bill, which was granted partly for this money and partly for money won, was null by the act, the claim of debt, if otherwise instructed, remained entire. But, in Scotland, such a claim, if exceeding £.100 Scots, could not be instructed except by the debtor's writ or oath; and any writing granted by him to the creditor would be void, under the act, as a security.

2. Usury consists in taking a higher rate of interest for the use of money lent, than is permitted by law. It is not committed by any contract made in a foreign country, which stipulates no more than the rate of interest allowed by the laws of that country, though it should exceed the rate of interest permitted here³. In this country, it is regulated by the 12 Anne, stat. 2, c. 16, which enacts, that no person shall take, "directly or indirectly, for loan of any moneys, "wares, merchandise, or other commodities whatsoever, above "the value of £.5 for the forbearance of £.100 for a year, and "so after that rate for a greater or lesser sum, or for a longer "or shorter time; and that all bonds, contracts and assu-

this case a reservation of any separate claim which the charger might have for furnishings or advances, such a claim being considered as remaining entire, though the security for it was void in terms of the act.

¹ In an English case, *Lloyd v. Gordon*, 2 Swanst. 180, the Chancellor granted an injunction to prevent the original payee of such a note from negotiating it. If a similar case occurred in Scotland, the Court of Session would probably grant an interdict against the negotiation, or would sequester the note, so as to take it into their own custody. As to the nullity of such a note in the payee's hands, see *Sigel v. Jebb*, 3 Stark. 1, per Abbot, C. J.

² *Robinson v. Bland*, 2 Burr. 1077.

³ In *Campbell v. Ramsay Haunay*, 15th Feb. 1809, F. C., £.8 per cent. was allowed on a bond granted in the East Indies. In *Wilkjinson v. Monies*, 28th June 1821, £.7 per cent. was allowed on a debt contracted in South Carolina. *Vide* also 1 Bell, 237, note 1, 4th edition, and English cases therein referred to.

“ rances whatsoever, made (after the time aforesaid) for payment of any principal or money to be lent, or covenanted to be performed upon, or for any usury, whereupon or whereby there shall be received or taken above the rate of £.5 in the hundred, as aforesaid, shall be utterly void.” It farther enacts, that any person who shall “ take, accept and receive, by way and means of any corrupt bargain, loan, exchange, chevisance, shift or interest of any wares, merchandise, or other thing or things whatsoever, or by any deceitful way or means, or by any cover, engine or deceitful conveyance, for the forbearing or giving day of payment for one whole year, of and for their money or other thing, above the sum of £.5 for the forbearing of £.100 for a year, and so after that rate for a greater or lesser sum, or for a longer or shorter term, shall forfeit and lose for every such offence the treble value of the moneys, wares, merchandise and other things so lent, bargained, exchanged or shifted.” The statute also imposes certain penalties on the brokers transacting the loan, who shall take above 5s. *per cent.* for their trouble, or 12d. *per cent.* for making or renewing the bill or bond, or any counter-bill or bond concerning it.

By this statute, every security granted for a usurious cause is absolutely void, (and that not only as to the principal party, but as to a cautioner bound conjunctly with him, though the usury should be stipulated by writing separate from the joint bond to which he is not privy¹,) either if more than the legal interest has been stipulated in it, though not actually paid, or if such interest is taken, though not stipulated in the security². But, in order to have this effect, the interest must be reserved, taken, or stipulated at the time of granting the security; if taken afterwards, without being then stipulated, this merely founds an action for triple penalties³. A promissory-note for £.65, 5s. on a loan of £.60, is usurious and

¹ *Strachan v. Graham*, 12th June 1823, 2 S. and D. 391; 3 Murray, 434.

² 1 Bell, 309-10.

³ In *Ferrall v. Shaen*, 1 Saund. 295, it was held not to be a good defence against a bond, that usurious interest had been taken upon it *after it was granted*, there being no evidence that this was contemplated at the time of granting it. At the same time, it was said that the plaintiff might thereby have rendered himself liable to the triple penalties.

void¹; also an agreement for the loan of stock, whereby the lender reserves the dividends it would have yielded, and also the option of having it replaced, or the sum produced by it repaid to him with 5 *per cent.* interest². In this case he was secured, at all events, in the principal, with 5 *per cent.*, and the chance of earning more. Intention is not declared necessary, in order to void the contract; but, if the exaction of more than the legal interest is proved to have proceeded from mistake, as from a miscalculation of interest, the contract will stand³. For the reasons already mentioned⁴, usury, like any other illegal consideration, may be instructed *prout de jure* though it should not appear on the face of the contract. Thus⁵, letters written by the payee to the grantor of a note alleged to be usurious, near the time of granting it, were admitted in evidence of the usury. But a declaration by the payee of a promissory-note, (not made at the time of granting it,) that it was a substitute for a bill, accepted on account of a gaming debt, was held to be inadmissible against an indorsee of the note⁶, not being part of the transaction.

A bill or note becomes invalid, in terms of the act, if even a small part of the consideration for it be usurious⁷. The words of the act do not distinguish between this case and that where the whole consideration is usurious.

Although the bill or other security should be annulled, the debt, if contracted previously without reference to the usurious transaction, may be proved *aliunde*⁸.

If the usurious debt is paid,—for instance, if it has been

¹ Scott v. Nicholl, 4 Dougl. 314.

² White v. Wright, 2 B. and Cr. 273.

³ 1 Bell, 310.

⁴ *Ante*, 111.

⁵ Kent v. Lowen, 1 Campb. 177-80.

⁶ Beauchamp v. Parry, 1 B. and Ad. 89.

⁷ Harrison v. Hannel, 5 Taunt. 780. This was an action on a bill, granted along with two other bills, by a father for behoof of his son, partly to cover a legal debt contracted by him at the time, and partly to cover a preceding usurious debt. The bill in question was therefore held void, as being granted for a usurious consideration, although the whole bills were sufficient merely to cover the legal part of the transaction.

⁸ In Phillips v. Cockayne, 3 Camp. 119, although the bill sued upon was held to be null as granted for usury, the plaintiff was found entitled to recover the original debt under a count for goods sold and delivered. In Gray v. Fowler, 1 H. Bl. 462, the Court of Common Pleas found, that the original debt

contracted on bills which are retired, the debtor cannot claim repetition, though he may reduce the bills, and sue for the triple penalties¹. In England, repetition of the usurious profits has been allowed in a court of equity, on the ground that the usurer was to be considered as the only party who was *versans in re illicita*². But it may be doubted whether both parties are not in this situation, though the borrower is generally the sufferer. On the other hand, it has been recently decided³, that a court of law will set aside a usurious bond, without requiring payment of the real debt, with legal interest; it being contrary to the policy of the usury laws to allow any effect to such a security. It has been also held⁴, that, if a security claimed on, under a commission of bankruptcy, turns out to be usurious, the creditor will not be allowed to rank on this security, even for what he has advanced. It was once decided⁵, that a debtor who had pawned goods on a usurious consideration could not demand them back, even in a court of law, without tendering the sum advanced to him; and⁶, that a party, who had granted bills innovating a usurious debt, could not claim to be reponed against a judgment upon these bills, (obtained under his own warrant of attorney,) without paying the principal and legal interest. The soundness of this last decision, however, was questioned in the more recent case first quoted. The other decision, which appears to have proceeded in part on the maxim, *In pari delicto, melior est conditio possidentis*, has also been overruled; and it is held that the tender therein referred to is not now necessary, either at law⁷ or in equity⁸.

being contracted for furnishings of malt, was good, although the deed sued on, which was granted for usurious interest in addition to that debt, was held to be void.

¹ Nisbet and Buchan v. Cullen, 1st Feb. 1811, F. C.

² Bosanquet v. Dashwood, Cas. Temp. Talb. 38; Ord on Usury, 141.

³ Roberts v. Goff, 4 B. and Ald. 92.

⁴ Benfield v. Solomons, 9 Ves. 84.

⁵ Fitzroy v. Gwillim, 1 T. R. 153.

⁶ Hindle v. O'Brien, 1 Taunt. 413.

⁷ Cowie v. Harris, 1 M. and Malk. 141; Tregoning v. Attenborough, 7 Bingh. 97; Parsons v. Heathorn, Chitty, 118, note 6; and observations in Wood v. Grimwood, 10 B. and Cr. 679.

⁸ Barnard v. Young, 17 Ves. 44.

It is farther said to be the rule in English courts of equity¹, to grant no relief against usurious contracts, unless the debtor pays the original debt and legal interest. The same principle appears to have been once adopted in Scotland, in a case² where the lender, having taken an heritable security, the effect of which (as held by the Court) was to give him 10 *per cent.*, it was decided, that the subjects mortgaged by the security were redeemable on payment of the principal sum with legal interest. But it is the opinion of a learned author³, that the security ought to have been altogether reduced; and this appears to be the only doctrine consistent with the words of the statute of Anne. Farther, if *the debt* is identified with the usurious contract, and was not antecedent to it, may it not be doubted, whether it is not contrary to the act of Anne, thus to preserve it to any effect, seeing that act is intended to nullify every debt depending on the usurious security? At all events, it is settled⁴, that, if the parties to a usurious contract should cancel it, and the debtor should grant a new security to the creditor for the principal sum really due, with legal interest, this new security will be good. Even in England, where a consideration is required to validate such a contract, when not under seal, the natural obligation to pay the original debt is held to be a sufficient consideration. But the true principle (applicable in Scotland) appears to be, that the consideration of such new security is not usurious,—a usurious consideration alone being declared by the act to be a ground of nullity⁵. A new security, however, granted for the illegal interest, cannot be enforced, being a security in terms of the act, “whereupon or whereby” more than the legal interest is exacted⁶. It has been even held⁷, that a new

¹ *Vide* Holt's Rep. 271, Art. 7, and cases therein cited. Ord on Usury, 141.

² *Meal v. Thom*, 27th Nov. 1810, F. C.

³ 1 Bell, 309, note 3.

⁴ *Barnes v. Headly*, Justice Chambre's opinion in 1 Campb. 167, as reversed by the Court of Common Pleas, in 2 Taunt. 184.

⁵ *Vide* argument with reference to *Wright v. Wheeler*, 1 Camp. 165, note.

⁶ In *Preston v. Jackson*, 2 Starkie, 237, a note granted for such illegal interest was found null even in the hands of an onerous indorsee.

⁷ *Per* Best, C. J. in *Wicks v. Gogerly*, 1 R. and M. 123; 1 C. and P. 396. In *Davies v. Franklin*, 1 B. and Ad. 142, the Court of King's Bench held, that,

security for the principal and legal interest, granted after payment of usurious interest on previous securities for the same debt, is usurious, unless the interest so paid is first deducted; because the effect of such a transaction, taken altogether, would be to leave the creditor in possession of usurious profits.

With regard to the indorsee of a bill or note granted either for usury, or any other illegal consideration, such a consideration may, in all cases, be pleaded against him, if he knew of it when he took the bill or note¹, or, in England, if he took it after it became due². But, unless under these circumstances, a *bona fide* holder of a bill or note granted for an illegal cause, will not, on that account, be liable to any objection at common law. The principle of this doctrine has been already explained³. The doctrine has been established by a number of decisions⁴. But there is a class of cases, in which

a judgment obtained on a warrant of attorney, given to secure a bond for a gaming debt, could not be set aside, if the granter of the bond had represented to the purchaser that it was a valid debt. But this opinion seems to have proceeded on the ground, that the personal exception against the party was sufficient to bar him from setting aside a judgment *actually obtained*.

¹ *Steers v. Lashley*, 6 T. R. 61; *Wyatt v. Bulmer*, 2 Esp. 537; *Newby v. Smith*, 2 Esp. 539.

² This was decided in *Brown v. Turner*, 7 T. R. 630. But the effect of an indorsee taking a bill or note which is overdue, in rendering him liable to the objections pleadable against the indorser, shall be afterwards considered under the head of indorsation. In a subsequent case, *Aubert v. Maze*, 2 Bos. and Pull. 371, the Court of Common Pleas held, that this decision, and that of *Steers v. Lashley*, were contrary to the principle of two previous decisions, *Petrie v. Hannay*, 3 T. R. 418, and *Falkney v. Reynous*, 4 Burr. 2070, in both of which cases, parties who had paid debts due by third persons on account of illegal transactions, were held to have a good action for reimbursement against those persons, on the ground that this action did not arise directly out of the illegal transaction, but was merely collateral to it. But the Court, in the case of *Aubert v. Maze*, considered these decisions to be very doubtful, and decided this case on an opposite principle, finding that the plaintiff had no claim against the defendant for the moiety of certain losses paid by him on an illegal insurance partnership in which both parties were jointly engaged. The principle deducible from this last case appears to be, that no party can have a claim arising, either directly or indirectly, from his accession to an illegal transaction. This principle seems also to be applicable to the case of *Seddons v. Stratford*, already noticed, *ante*, 128, note 1.

³ *Ante*, 112.

⁴ In *Winstanley v. Bowden*, 5. Selw. N. P. 385, 5th edition, Lord Kenyon held it to be no defence by the maker of a promissory-note against an innocent indorsee, that the note had been given for bets against the defendant in a lottery-

securities granted for such considerations are declared by statute to be altogether void. Among these, are securities granted for gaming considerations, as provided against in the foregoing act of 9 Anne; securities granted for the ransom or on account of money lent for the ransom of British ships or merchandise from an enemy¹; and, till the recent act 58 Geo. III. c. 93, all securities granted for usurious considerations. The decisions in Scotland were long at variance with those in England, on the question, whether the nullity declared with regard to these several securities renders a bill or note ineffectual in the hands of a *bona fide* onerous indorsee. In Scotland, it was at first decided, with regard to bills granted for gaming debts², that their nullity, under the act 9 Anne, cannot be pleaded against an onerous indorsee. Such a nullity was indeed sustained about the same time, and after nearly the same course of argument, as a ground for reducing similar bills, in a question with a creditor arresting their amount in the granter's hands; the Court holding, that the cause of granting them might be proved, in terms of the act, either by the oath of the party winning the money, or by the nominal payee to whom the bills had been taken payable for his behoof³. In this case, however, it might be held, that a creditor arresting the debt was not in the situation of an onerous indorsee, but was liable to all the objections pleadable against his principal. It seems to have been likewise held, with regard to usury, in one case⁴, though not very intelligibly reported, that it does not form a good ground of nullity against an onerous indorsee.

insurance. In *Dagnall v. Wylie*, 2 Camp. 32, 11 East. 43, the indorsee of a bill suing the acceptor was found not to be affected by an exorbitant charge for brokerage which had been made upon it, (by a party whose name was not on the bill,) contrary to the act 12 Anne. In *Jones v. Davison*, Holt, 256, this doctrine was held regarding the effect of an exorbitant charge for commission, (by a party who undertook to get a bill discounted, but whose name was not on the bill,) against an indorsee. *Vide* also the same doctrine stated in *Wyatt v. Bulmer*, 2 Esp. 537.

¹ *Ante* 129, note 9.

² *Neilson v. Bruce*, 25th Jan. 1740, Morr. 9507-8; and *Stewart v. Hislop*, 18th Feb. 1741, Morr. 9510.

³ *Pringle v. Biggar*, 7th Nov. 1740, Morr. 9509.

⁴ *Campbell v. —*, 13th Dec. 1773, Morr. 16433.

In England, though a strong inclination was once expressed¹, to find such bills or notes available to *bona fide* onerous indorsees, it is settled, by a long train of decisions, that, when they are declared altogether null by statute, they cannot be made available to any purpose, in whatever hands they are placed². Indeed, it does not appear that the words of the different acts, declaring the absolute nullity of the securities to which they refer, can be reconciled with the idea of giving them effect even in the hands of indorsees. The correctness, therefore, of the early Scotch decisions on this subject has been long questioned, and, after several recent cases, in which contrary opinions were held by the Court³, it has been at last deliberately decided, that the *bona fide* onerous indorser

¹ *Per* Gibbs, C. J., in *Jones v. Davidson*, Holt, 257-8.

² The first case on this subject is *Bower v. Bampton*, 2 Str. 1155, where the act 9 Ann. was held sufficient to nullify certain promissory-notes given for money which the grantee had advanced to the granter to play with dice, even in the hands of a *bona fide* onerous indorsee. The same rule was enforced against such an indorsee, in *Lowe v. Waller*, 2 Dougl. 735, being the case of bills that were held by the jury to have been taken for a usurious consideration. It was again enforced by Lord Ellenborough at Nisi Prius, with regard to bills granted for usurious causes, in the cases of *Young v. Wright*, 1 Camp. 139, and *Ackland v. Pierce*, 2 Camp. 599, though the usurious agreement, in this last case, was not known to the drawer, but was the result of an understanding between the acceptor and a third party. Afterwards, great doubts were expressed on the point in the case of *Jones v. Davidson*, note 1, by Gibbs, C. J., who said, that he would reserve it when it occurred. But, in the subsequent case of *Lowes v. Mazzaredo*, 1 Stark. 385, which was the case of a bill, first indorsed to one party for a usurious cause, and then indorsed by him onerously to the plaintiff, who had no knowledge of the usury, the Court of King's Bench held, that the first indorsement, (through which the plaintiff derived his title,) was *entirely voided* by the act of Anne, and that it was too late to disturb the rule which had been established by the case of *Lowe v. Waller*. In another case, *Shilleto v. Theed*, 7 Bingh. 405, the nullity was enforced against the *bona fide* onerous indorsee of a note which had been granted for a bet of £.185, on account of the St Leger Stakes. The same rule was enforced in *Aliker v. Howell*, 1 Nev. and Mann. 191.

In one case, *Henderson v. Benson*, 8 Price, 281, a bill accepted for a gaming debt was held to be null even in the hands of an indorsee, although the drawer, at the time of drawing, knew nothing either of the acceptor or the payee; it being held, with reference to the consideration, as affecting its validity, that it was not a complete instrument till acceptance.

³ *White's Trustees v. Johnstone's Trustees*, 22d June 1819, N. R., noticed in 5 S. and D., 110. This case was compromised. *Elliot v. Cocks and Co.*, 24th Nov. 1826, 5 S. and D. 40.

of a bill accepted for a gambling debt, has no claim on it against the acceptor ¹. But it has been decided, that the *bona fide* and onerous assignee to a bond granted for such a debt has recourse against the cedent, although the warrandice should be from fact and deed only ².

With regard to one of the cases now mentioned, viz. that of securities granted for usury, the question is now excluded, by the 58 Geo. III. c. 93, which enacts, that no bill or note, though given for a usurious consideration, or on a usurious contract, shall be void in the hands of an indorsee for value, unless he knew of the usurious consideration or contract, at the time of giving value for such bill or note. It has been held in England ³, that when a note is tainted with usury, the holder, in order to get the benefit of this statute, must prove that he is a *bona fide* holder; and the same thing would probably be required in Scotland, notwithstanding the ordinary presumption of *bona fides* in favour of all holders of notes, because, unless by virtue of this statute, the document is not a note, and, consequently, has none of its privileges.

The law of England has adopted some modifications of the doctrine now mentioned ⁴, with regard to the indorsees of bills or notes declared null by statute; and which, whether the decisions establishing them relate to usury or other considerations, are equally applicable to every such case of nullity. 1st, Although the indorsee should be cut off from his action against the other parties to such a bill or note, he has a good claim against his indorser ⁵. This claim must be made, either

¹ *Hamilton v. Russell*, 18th May 1832, 10 S. D. B. 549.

² *White's Trustees v. Graham*, 16th May 1828, F. C. In a recent case, *Ballantyne and Co. v. Abud and Sons*, 15th Jan. 1828, 6 Shaw and D. 384, a majority of the Court, (2d Division,) viz. Lords Glenlee and Alloway, held, that an allegation of usury by the holders of a bill in acquiring it, was not a good ground for passing a bill of suspension by the acceptors. But this opinion was not necessary for deciding the case, as the allegation was too vaguely made, and the presiding Judge (Ld. J. C.) founded his opinion for passing the bill on this last point alone, while he reserved his opinion on the other point.

³ *Wyat v. Campbell*, 1 M. and Malk. 80.

⁴ Laid down in *Bower v. Bampton*, 2 Str. 1155.

⁵ In *Edwards v. Dick*, 4 B. and Ald. 212, the drawer and payee of a bill for money won at play, who had indorsed it to a third party, having pleaded its nullity against his indorsee, the Court of King's Bench repelled the plea,

on the bill or note itself, or on the original consideration of indorsing it¹. In a case already referred to², the Court of King's Bench appear to have sustained action on the bill, holding, that though the words of the act 9 Anne nullified all bills, notes, &c. generally, it could not be meant to nullify the obligation by the payee and indorser of such bills or notes to onerous indorsees. An indorsement has long been held³, to be a new bill by the indorser, in which he is liable to the indorsee as drawer. The principle of this doctrine appears to apply also to an action brought by the holder against a previous indorser, whose indorsement was granted after the usury; for the first indorsement of that kind may be considered as a new bill, which may therefore be effectually transmitted by the subsequent indorsements; and, besides, each indorser will be liable to the holder on his own indorsement, as on a new bill⁴; 2dly, If an indorsee to such a bill or note takes a new security, without knowing of the nullity that affected the old one, the new security will be good to him⁵; such a security not being granted for any consideration struck at by the statutes. The same rule will apply to a security granted by the borrower on the lender's account to a party

holding, that a different decision would, (contrary to the policy of the act,) enable the winner of such money to retain it in his own hands.

¹ Chitty, 115.

² Edwards v. Dick, 142, note 5.

³ Post.

⁴ Vide Day v. Stuart, 3 M. and Pay. 334, 6 Bingh. 109, where this doctrine was held in an action by the indorser of a bill said to have been drawn for stock exchange differences against the drawer and indorser. In another case, Greenland v. Dyer, 2 M. and Ryl. 422, Dans. and Lloyd, 147, it was decided, that a bill accepted to the broker for repayment of illegal stockjobbing differences paid by him, is good to an onerous indorsee. In Amory v. Mereweather, 2 B. and Cr. 573, the contrary was decided, solely because the plaintiffs were held not to be in *bona fide*.

⁵ This was held where the original security had been declared void, as granted on account of a gaming debt, in George v. Stanley, 4 Taunt. 683. The same doctrine was held in Cuthbert v. Halley, 8 T. R. 390, where a person having received *bona fide*, and for value, several promissory-notes which had been given to his indorser for usurious causes, and having afterwards exchanged them for a bond from the grantor, the Court of K. B. sustained action on the bond, holding that it was not a security granted for a usurious consideration. In the case of Barnes v. Headly, already cited, 137, note 4, a decision was given in favour even of a new security between the parties to a preceding usurious contract, the usurious contract having been annulled, and the new security granted only for the principal sum and legal interest.

to whom the lender is indebted, but who is not privy to the usurious part of the transaction¹. But when the indorsee, before he takes the new security, is aware of the illegal consideration of the former security, it has been held, that, as to him, the new security is in the same condition with the old one, and that therefore it is void, as being taken by him in furtherance of the illegal consideration². Such a new security will of course be invalid, if granted to the person who is party to the original transaction³. On the other hand, when a bill has been granted as a substitute for a previous bill tainted with usury, and a third bill is then granted, merely for the purpose of raising money to retire the second bill, this third bill is not challengeable⁴. When two bills are granted, one for a sum really due, and another for usury, (both being null, however, on that account, as they formed part of the same transaction,) it has been held, that a new note granted as a substitute for the first of these is good, even to the party privy to the usury, in respect that this second note is not only given, like the first, for the sum lawfully due, but is distinct from the usurious transaction⁵. On the same principle, it has been held in England⁶, that when a note partly for money lent, and partly for a gaming consideration, was paid in part, and two separate notes of £.43 granted for the balance, (either of them

¹ *Vide Chitty*, 117, note 6.

² *Chapman v. Black*, 2 Barnew and Ald. 588. In this case, the plaintiff having first taken bills discounted usuriously by his indorser, without being aware of the usury, and afterwards, on learning it, having exchanged them for new bills, in which it was agreed that the name of the drawer who had discounted the former bills should be omitted; the Court of K. B. held, that the plaintiff, by this transaction, lent himself to conceal the usury, and that therefore he must be in the same situation with the party guilty of it. In a later case, *Williams v. —*, 5 M. and Ryl. 121, where the plaintiff sued as indorsee of a note said to have been granted in lieu of one which had been given on a gambling transaction, a declaration by him, before receiving the second note, as to the consideration of the first, was held to be admissible, and the Court refused to disturb the verdict for him.

³ *Harrison v. Hannel*, 5 Taunt. 780, *ante*, 158, note 3; *Wynne v. Callender*, 1 Russ. 293, the Court of Chancery decreed for redelivery of French bills, which the plaintiff had given to the defendant as substitutes for bills granted by him for a gaming debt, on account of the illegality of the consideration.

⁴ *Marchant v. Dodgin*, 2 M. and Scott, 632.

⁵ *Turner v. Hulme*, 4 Esp. 11.

⁶ *Hubner v. Richardson*, 1819, Bayley, 516, note 66.

being sufficient to cover the gaming consideration,) and one of them was indorsed to the plaintiff, who knew nothing of the gaming, a promise by the granter of this note to pay the plaintiff was sufficient to separate his note from the gaming consideration, and to shew that the defendant imputed this consideration entirely to the other note. When a person who owes two debts, one usurious and the other lawful, makes an indefinite payment, such payment is imputed, first to the lawful debt, and only the balance to the usurious debt¹. 3dly, It has been decided, that if a bill originally good is discounted and indorsed by the drawer for a usurious consideration, and comes afterwards by indorsation for value, even to the drawer's assignees, they not knowing any thing of the usury, it will be good to them, as it is good in its original concoction, and likewise in the indorsement under which they lay claim to it². This case was held by the Court to be distinguishable from a case already noticed³; and the distinction was probably held to consist in this, that there the party from whom the plaintiff derived right directly, (by indorsation,) had the bill indorsed to him for a usurious cause, and that the plaintiff's title could not be better than that of his author; whereas, in the other case, there appears to have been an intervening indorser, who was no party to the usurious part of the transaction. But it may be doubted, whether there is any solid distinction between the two cases; since, in this last case, likewise, the title of the plaintiff's author, and consequently his, (the one being derived from the other,) was founded on the first indorsement, which being null on account of usury, must nullify all the subsequent indorsements derived from it. In a later case, accordingly⁴, the last decision appears to be considered by the Court of King's Bench as inconsistent with the first⁵. The point now stated is excluded

¹ Wright v. Laing, 3 B. and Cr. 166; 4 D. and Ryl. 783.

² This was first ruled by Lord Kenyon, at N. P. in Daniel v. Cartony, 1 Esp. 274, and afterwards decided by the whole Court of King's Bench in Parr v. Eliason and others, 1 East. 92.

³ Lowes v. Massaredo, 140, note 2.

⁴ Chapman v. Black, *ante* 143, note 2.

⁵ An eminent writer on the law of bills, Bayley, 522-3, gives the same view which has been now taken of the inconsistency of those two decisions, while he evidently considers the essential circumstances of both cases as the same.

from discussion, with regard to usurious contracts, by the 58 Geo. III, c. 93, which protects *bona fide* indorsees in all cases; but it may probably be considered as still admitting of doubt in England, with regard to the first indorsement of bills or notes for any of the other considerations which are declared by statute to be grounds of nullity.

As questions of usury occur frequently in bill transactions, it is proper to state the leading points decided, as to what does or does not constitute usury, in such transactions.

1. It is usury to retain interest at the time of the loan from the money borrowed, or to stipulate that it shall be paid before expiration of the year¹. In both these cases the lender exacts 5 *per cent.* for less than a year, whereas the 12 Ann. declares that there is usury, unless interest is strictly 5 *per cent. per annum.* This doctrine, that taking annual rent beforehand is usury, was recognised under the old Scotch law of usury². But there is an exception in favour of bankers discounting bills to third parties in the ordinary course of trade; it being their practice to indemnify themselves for the trouble and risk arising from the advance of money on bills, by retaining the interest out of the advance³. This practice, however, will not be permitted as to bills payable at a term much beyond that usually discountable, being held, in such a case, to be a cover for usury. Thus, where the purchase of certain annuities was accomplished by means of a bill for £.5000, at 3 years' date, which was discounted for £.750 discount, and which, before it became due, was exchanged for two successive bonds of the same amount, the Court of Common Pleas held⁴, that this was a mere forbearance of the debt previously due, and con-

¹ 1 Bell, 309, note 5. This practice is forbidden as usurious, by a Scotch statute, 1621, c. 28, which enacts, "That no person who lends or gives out money, and receives annual therefor, shall retain the time of the lending, exact, crave, or receive from their debtors the annual of their lent sums, until the term of payment appointed by their bands be first come."

² Johnston v. the Laird of Haining, 1st Dec. 1680, Morr. 16414.

³ Assumed in argument in Lloyd v. Williams, 3 Wils. 256, Holt, p. 262-3, note on the Law of Usury. Vide also Lord Alvanley's opinion in Marsh v. Martindale, 3 Bos. and Pull. 158, and per Lord Hardwicke in Thomson ex parte, and Maslar ex parte, 1 Atk. 150.

⁴ Marsh v. Martindale, 145, note 3.

tracted on the annuities, for more than the legal rate of interest, and was therefore usurious.

It is usury to exact a premium from a debtor for taking one of his debtors as a substitute for himself¹, or for taking a sum of money from a surety for the forbearance of a debt².

It has been also held usurious to advance money under an agreement, whereby the debtor engages to pay discount on certain bills, besides paying ordinary interest on the same bills from their dates, as also exchange and all expenses³, or to exact a *premium* for procuring a discount⁴. But it is not usury to stipulate in a contract of sale, that 6 *per cent.* shall be paid on bills granted for the price, such interest being held to be part of the purchase money⁵.

It has been held, that it is not usury for an acceptor to take 6d. *per pound* as a consideration for anticipating the payment of his own acceptance, that not being a consideration for forbearance of a loan. But the practice was censured⁶. Nor is the *bona fide* sale of a bill or note, for less than its amount, as distinguished from the discount of it, usurious⁷, although, when bills with a certain party's name on them were ostensibly sold by his confidential agent at a deduction far below the legal discount, this was held to be a discounting of them for that party's behoof, and consequently to be usurious⁸. It has been held in England⁹, that a note promising to pay a certain sum by instalments, and stipulating that, on default of any of the instalments, the whole of the balance then due shall be paid up immediately, without rebate of interest for

¹ *Wade v. Wilson*, 1 East. 195.

² *Manners v. Postan*, 3 B. and P. 343.

³ *Harvey v. Archbold*, 1 R. and M. 184; 3 B. and Cr. 626. The jury negatived the plea of usury on the evidence.

⁴ *Meagoe v. Simmons*, 1 M. and Malk. 121.

⁵ *Beets v. Bidgood*, 1 M. and R. 143; 7 B. and Cr. 453.

⁶ *Barclay v. Walmesley*, 5 Esp. 11; 4 East. 55.

⁷ In *ex parte Lee*, 1 P. Williams, 782, a party was found entitled to take out a commission of bankruptcy on bills which the bankrupt had granted to third parties, and which they had indorsed to the plaintiff for 10s. *per pound*. In the *King v. Ridge*, 4 Price, 56, it was assumed that the sale of a bill is legal.

⁸ The *King v. Ridge*, preceding note.

⁹ *Wells v. Girling*, 1 Br. and Bingham 447.

the anticipation of payment, is not usurious, being held to be a penalty. But the stipulation would not be sustained on this ground in Scotland, where, as already shewn, a penalty is held to be inconsistent with the nature of a bill or note.

When a banker, in discounting bills with bankers, agrees to allow them deduction, besides discount, of 1 *per cent.* for former bills which he holds himself bound in honour, though not in law, to pay, as they had been discounted to parties who had failed, in consequence of his guaranteeing their solvency in other cases, this has been decided not to be usury¹.

Bankers, besides taking the discount already mentioned on bills or notes, are entitled, in practice, to charge a reasonable sum as commission, for remitting the bill for acceptance, and necessary expenses², or even for the trouble of accepting bills, if the party accommodated gives funds for paying them, so that there is no advance of money by the person receiving the commission³, and this though the bills or notes should be

¹ *Solaste v. Melville*, 7 B. and Cr 430; 1 M. and Ryl. 198.

² This was allowed in the following cases, viz. *Winch qui tam v. Fenn*, cited in a note to *Auriol v. Thomas*, where a charge of 5s. *per cent.* on the gross sum in the bill, without referring to the time it had to run, was found legal; *Auriol v. Thomas*, 2 T. R. 52, where a charge of commission by the discounter on bills made payable at Madras, was authorised as conformable in its amount with the custom of India; *Ex parte Jones*, 17 Ves. jun. 332; 1 *Rose's Cases*, 29, where the Lord Chancellor allowed a claim on bills payable in London, and discounted by a banker at Feversham, who, besides discount, had charged 2s. 6d. *per cent.* for the trouble and expense of providing his party with drafts on London for their amount; *Benson v. Parry*, where, according to the statement of it in *Auriol v. Thomas*, the Court of King's Bench unanimously held that a reasonable commission was a good charge; and *Baynes v. Fry*, 15 Ves. 120, where a similar charge was sustained, on account of the trouble of sending a bill for payment to Hamburg.

³ In *Masterman v. Cowrie*, 3 Campb. 488, a banker in London being in the habit of accepting bills for the accommodation of a merchant there, (drawn by a banker in Yorkshire, who charged 1s. *per cent.* for his trouble in drawing them,) but which bills the party accommodated gave money to retire when they became due, and the acceptor charging 5s. *per cent.* for his trouble in accepting and retiring them, it was held by Lord Ellenborough, 1st, That this charge could not be a cover for usury, because the party making it advanced no money; and, 2dly, That such a charge might be allowed as a compensation for trouble on transactions in town as well as in the country, since a banker must keep an establishment for such transactions wherever the money is to be paid. The same rule was settled in several cases in Scotland;—first, in *Pitcairn's Creditors v. Foggo*, 1768, *Morr.* 16433, where a commission not exceeding $\frac{1}{2}$ *per cent.* was found to be allowable "on all money transactions for account of another;"

payable in the same place where they are discounted. It has been farther held¹, that even exorbitant brokerage exacted by a bill-broker for the trouble of getting a bill discounted (the discounter taking no more than the legal interest) is not usurious, though it may be questionable on other grounds. On the other hand, it has been decided², that there can be no commission for accepting bills, (for a third party's accommodation,) if the acceptor is to pay the bills, and thus lends the money, this being a mere cover for usury. It has been likewise decided on the same ground³, that a commission of $3\frac{1}{2}$ per cent. given to a party discounting a bill, for guaranteeing the acceptor's solvency, is usurious, there being no reason to doubt his solvency, and the discounter having refused to give money for the bill, unless he was allowed to guarantee on these terms. When a party, for whose accommodation money has been raised by drawing and redrawing bills, was charged with the expense thence arising, though it should exceed the legal interest, this was held not to be usury⁴, and he was found also liable for interest on this claim. Merchants, or other persons besides bankers, may charge commission on account of trouble⁵, although it would seem that they must make out a special case of corresponding trouble, from which necessity bankers are exempted. As to the amount of commission, it is a question of fact, whether it is adequate to the expense and trouble incurred. Beyond that, it will be held to be a mere

afterwards, in *Playfair*, 6th June 1797, *Morr.* 16438, and *Grierson v. Bertram and Co.* 6th June and 21st November 1797, cited in that case, where commission on bills discounted was allowed to the amount of $\frac{1}{2}$ per cent.; and in *Walker v. Allan*, 15th May 1800, *Morr.* No. 1, App. to Usury, where a charge of commission on a banker's account-current, varying on different occasions from 1 per cent. to much less, but not exceeding $\frac{1}{2}$ per cent. on the whole sum, was sustained. This case was afterwards sent back from the House of Lords, and was ultimately decided on a preliminary plea of prescription.

¹ *Dagnall v. Wigley*, 11 East. 43. In *ex parte Hanson*, 1 Mad. 112, the same thing was found as to a charge of 10s. by a bill-broker on a bill indorsed to him in payment of an antecedent debt. *Vide* also *Jones v. Davison*, Holt. 256.

² *Kent v. Lowen*, 1 Camp. 177, per Lord Ellenborough.

³ *Lee v. Cases*, 1 Taunt. 511.

⁴ *Cumming v. Paxton*, Robertson's App. Cas. 582.

⁵ This opinion is indicated by *Alvanley, C. J.*, in *Marsh v. Martindale*, 3 B. and P. 158. In *Baynes v. Fry*, 15 Ves. 120, commission was allowed to an agent for his trouble; though he does not appear to have been a banker.

cover for usury. If, besides being unreasonable, it appears to have been held out to the discounters, as an inducement for advancing the money, this will be an additional proof of usury¹. There is no precise rule fixing the rate of commission. In one case already cited², 5s. *per cent.* was allowed; in another, 1s. 8d. *per cent.*³; in a third, where there was a complicated account⁴, the jury, though contrary to Lord Ellenborough's direction, found that $\frac{1}{2}$ *per cent.* was not too much; and in another case⁵, where 7s. 6d. was charged, without an averment that there was any considerable expense or trouble, the jury, (though contrary both to Lord Ellenborough's direction and to the subsequent opinion of the Court,) held that it was not unreasonable. It has also been held, that a commission of 10s. *per cent.*, by a bill-broker in the country, on a bill payable in London, is not usurious⁶. In a late case⁷, where a country banker gave his draft on a London banker at two months, in exchange for a bill payable at the same date, and charged 4 *per cent.* during the time the bill had to run, as commission, this charge was held not to be usurious. In the Scotch cases already cited, the commission was generally $\frac{1}{2}$ *per cent.*

¹ In *Harris v. Boston*, 2 Campb. 348, Lord Ellenborough left it to the jury to say whether the commission charged ($2\frac{1}{2}$ *per cent.*) exceeded a fair remuneration, and, if so, directed them to find that it was a cover for usury. In *Carstairs v. Stein*, 4 M. and S. 195, the same general doctrine was implied in Lord Ellenborough's direction, though the jury found that the commission charged was reasonable. His Lordship further relied on the circumstance of the commission being held out as an inducement to the discounters. In the case of *Palmer v. Baker*, 1 M. and S. 56, a charge of £.200 for trouble, besides payment of the debt with interest, and all other costs, charges, damages and expenses, was sustained, there being no ground to think that it was unreasonable in the circumstances of the case. *Vide* also the Lord Chancellor's opinion in the Scotch case of *Walker v. Allan*, 2d March 1802, where he lays it down, that a party charging more than 5 *per cent.* must prove that the excess was a necessary compensation for trouble, &c. otherwise it will be imputed to forbearance of the money, and will be accounted usury; 1 Bell, 5th edition, note 3.

² *Winch v. Fenn*, 147, note 2. The same in *Caliot v. Walker*, 2 Anstruth, 495.

³ *Ex parte Jones*, 147, note 2.

⁴ *Carstairs v. Stein*, note 1.

⁵ *Brooke v. Middleton*, 1 Campb. 445.

⁶ *Ex parte Hanson*, 1 Maddocks, 112.

⁷ *Stoveld v. Eade*, 12 Moore, 277; 4 Bingh. 81.

It is usury to take the full discount of a bill, and give in payment of it another bill which has some time to run, without making a corresponding deduction of interest¹; but not if the banker makes an abatement of discount corresponding with the number of days that the bill given by him has to run. Farther, if the new bills are drawn in another place which has the exchange in its favour, so that the bills then bear a *premium* in the market, which the party accommodated may get by disposing of them, it may be held, (though the point does not seem to have been decided,) that this *premium* must be computed as part of their value. If the discounter, after deducting the discount, asks the other party how he wishes to be paid, and, by his own desire, gives him bills on London, some at thirty days, and others at a shorter date, this is held to be the same thing, as if the bill-holder had first got the money, and then bought bills on London, the number of days at which the bills on London were made payable being considered necessary to cover the expense of the remittance². It appears, indeed, that Lord Kenyon once³ expressed an opinion, that, to give such bills or notes, without deducting interest for the time they had to run, was usury, whether the bill-holder desired to be paid in them or in money; and he is reported to have adhered to that opinion in a subsequent case⁴. But his Lordship's opinion seems to have been overruled by the decision now cited.

¹ In *qui tam* *Matthews v. Griffiths, Peake, C. N. P. 200*, usury was held to have been committed, by taking 5 *per cent.* discount on a bill, and giving in exchange for it a bill on London at six days' date, without an allowance of interest for the time it had to run. In *Parr v. Eliason, 1 East. 294*, the usury consisted in taking full discount on a bill, and paying it in part with a bill at three months' date. *Vide* also *Hutchinson v. Pyper, 4 Taunt. 810*.

² This decision was given under the circumstances stated in the text, in the case of *Hammet v. Yea, 1 Bos. and Pull. 152*. A decision involving the same principle was given in *Stoveld v. Eade, 4 Bingh. 81, 12 Moore, 277*, where a party having asked a country banker to give his bill on London in exchange for one of his, and the latter having done so, but charging £.19, 10s. for his trouble, (when the legal interest on the amount of the bill, £.2500, for the time it had to run, two months, was £.22, 5s.) the Court of C. P. decided that this was not usury, the transaction being an exchange of bills, not a loan, and not being held to be a covert loan, as the charge was less than the legal interest.

³ *Matthews v. Griffiths*, note 1.

⁴ *Maddock v. Hammett, 7 T. R. 184*.

It is proper to mention here, (though not strictly connected with the effect of usury on the validity of obligations in bills or notes, which forms the proper subject of our present discussion,) that, with reference to a claim for statutory penalties on account of usury, it was decided, in the case last cited¹; that, although bills should be given instead of money for the discounted bills, without allowing interest for the term that the former had to run, the usury is not thereby complete, if the discounter, instead of getting money for the discounted bills when they become due, merely gets other bills, which have not been paid at the date of the action, it being held, that he has not yet, in terms of the act, taken money either by way of interest or principal. The same doctrine was likewise held in a more recent case², where the Court of King's Bench decided that the usurious act could only be considered as completed in the place where the bills for which the usurious profit was secured had been paid. It appears also to have been held by the Court of Session in a case³, where they found one usurious act to fall under the limitation enacted by 31 Eliz. c. 6, § 5, in respect that the bill to which it referred had been *settled* more than a year before the date of the action, and with regard to certain other acts, required a condescendence as to the time when the bills were *settled*. But a contrary decision was given in a recent case, wherein it was held that the statutory limitation of the action for triple penalties commenced at the discounting of a promissory-note; thus implying that the usury was completed by the mere discounting, and before payment of the note was received⁴. In an English case⁵, where a person who had lent money usuriously on bills, afterwards lent his debtor another sum of money, not with reference to the bills, but on his general credit, and the debtor paid the bills with this money, this was held by the Court of King's Bench to be a

¹ *Maddock v. Hammett*, 150, note 4. The point here stated is likewise implied in Lord Ellenborough's opinion in *Borrodaile v. Middleton*, 2 Camp. 54, ante, 32, note 5.

² *Pearson v. M'Gowran*, 3 B. and Cr. 700; 5 Dowl. and Ryl. 616.

³ *Morrison v. Connell*, 24th June 1808, F. C.

⁴ *Morrison's Trustee v. Inglis and Co.*, 2d Dec. 1823, and 20th Jan. 1824, 2 Shaw, 626; F. C. This decision was pronounced by a narrow majority.

⁵ *Wright v. Laing*, 3 B. and Cr. 166; 4 Dowl. and Ryl. 783.

payment by the debtor, and not by the lender of the money, who having thus got full payment of his usurious debt, was found liable in the triple penalties.

It is usury to convert interest into a new principal sum bearing interest before the term of payment. The prohibition of this practice is implied in the Scotch act 1621, c. 28, which enacts, that "it shall be lawful, at the time of lending money and making of bonds, to add the annual into the principal sum, providing always neither principal nor annual be exacted or craved *before the term of payment* appointed by the said band." This statute was founded on in a case¹, where a bond having been taken at Martinmas 1774 for £.1000, payable at the succeeding Martinmas, with the interest of the first year and till payment, the creditor, at a settlement of accounts, charged interest and accumulated interest for each half year separately, and took a bill for the amount, on which, as well as the bond, he brought his action. The Court sustained the bond for the principal sum and legal interest, but refused action on the bill, in respect that it "was in part made up of undue exactions." This decision appears to establish, that it is usury to state the interest as due, and bearing interest before the term when it is payable.

The same case seems to establish, that no accumulation of interest can, in general, be allowed, unless when made by a new contract. But it has been decided², that bankers may strike a balance on their accounts every quarter, and include interest as well as principal in a new sum from that date, when it is the custom of the place, the Court holding such a custom to be equivalent to a new agreement. On the other hand³, Lord Ellenborough refused to allow a charge by bankers of compound interest on half-yearly rests, although they alleged this to be their universal practice, unless it could be proved that the debtor knew of the practice. The result of these decisions appears to be, that, even in the case of bankers, if there is not a new agreement to accumulate the interest due, there must be such an established custom as is equivalent to it⁴. It has been decided⁵, that interest ought to be accumulated yearly on money advanced by an agent in making

¹ *Dun v. Colhoun*, Feb. 12. 1790, M. 16436. ² *Caliot v. Walker*, 2 Ans. 495.

³ *Moore and others v. Doughton*, 1 Stark. 487; *vide* also *Dawes v. Pinner*, 2 Camp. 486, note. ⁴ *Vide Clancarty v. Latouche*, 1 Br. and B. 420.

⁵ *Bruce v. Hunter*, 3 Camp. 467.

insurances for his principal ; it being held, (besides the presumption that the debtor had agreed to the charge, from his receiving annual accounts made up on that principle for a number of years without objection,) that this “ was the uniform manner of making up accounts of this description.”

By a recent statute, 3 and 4 W. III. c. 98, § 7, the usury laws are repealed entirely with regard to bills or notes payable at or within three months after date, or not having more than three months to run. Under this enactment a warrant of attorney to secure the amount of such a bill has been sustained¹.

It is usury for the discounteer of a bill to give goods in part of its amount, at a sum so much beyond their real value, as to afford a presumption that his purpose was to get usurious interest². But this has been held not to be usurious, when goods partly furnished, with cash, in the discount of a bill, were given at the same rate as if there had been no bills, and were used by the discounteer in his trade³. On this subject the rule appears to be, that if the borrower proves that the lender compelled him to take goods instead of money, it will be presumed that the goods were given at a rate beyond their value, for the purpose of usury ; and the lender must obviate this presumption, by proving that, when sold, not separately, but in the lump, they would bring their estimated price⁴.

¹ *Connop v. Yeates*, 4 Nev. and Mann. 302.

² In *Davidson's Executor v. Barnard*, 1 Esp. 11, Lord Kenyon held it usury to lend money by giving stock to the amount of £.1500 at a valuation of 75, when the current price, and that for which the stock was actually sold, was only 72½. In *Pratt v. Willey*, 1 Esp. 40, the same judge held it usury in the discount of a promissory-note to give, in part of its amount, a diamond ring, which he rated much beyond its value. In *Rich v. Topping*, 1 Esp. 176, the same principle was recognised, but the proof of the goods having been given at an undervalue failed. Lord Kenyon said, that it was not usury though “ the goods are charged at rather a high price, provided it is not so extravagant, “ that it appears to be for the purpose of receiving exorbitant interest under cover “ of it.”

³ *Evans v. Whyte*, 3. M. and Pay. 130.

⁴ *Davis v. Hardacre*, 2 Camp. 375. In this case, where the discounteer of a bill had obliged the holder to take in part of it an imitation of Poussin, at a valuation of £.150, (it being offered to be proved that the discounteer had himself bought it for £.32,) Lord Ellenborough held, that where goods were thus forced on a party who wanted money, there must be proof “ that they were “ estimated at a sum for which he could render them available upon a re-sale, “ not at what might possibly be a fair price to charge to a purchaser who stood “ in need of them.” In the case of *Barker v. Vansommer*, 1 Brown's C. C. 149, the Lord Chancellor laid it down, that where goods are given as a substitute for a loan to a person who wants money, the value put upon them must be, not the

On the other hand, if the borrower voluntarily agreed to take the goods at the valuation, expecting to make profit by them, (though the lender had previously refused to discount the bill unless he did so,) the former must prove that the goods were valued too high, before he can establish usury¹. The mere circumstance of goods being given in part of the bill or note, will not raise a presumption against the discounteer, unless it is proved that he forced them on the borrower².

It is not usury to stipulate more than the legal rate of interest, when the lender is exposed, in certain events, to lose the debt, as when he lends money on a bottomry bond, or a bond of redeemable annuity; the safety of the principal sum depending, in that case, on the ship, or on the life of the annuitant. In one case³ the Court of Session sustained a bottomry bond at 10 *per cent.*, containing, besides, a clause which authorised either party to give up the contract on two months' notice, and likewise a clause which entitled the lender, in case of salvage, to claim a proportion of the articles saved, although this clause was admitted not to be usual in such bonds. But the risk must be real, not a pretence for covering usury; and the additional interest must be proportioned to the risk. An agreement which leaves the principal sum secure, and puts only the interest in hazard, in consideration of a higher rate of interest, will be held a mere device to cover usury⁴.

That part of the act 12 Anne, which inflicts triple penalties on any person taking more than the legal interest, declares, that half of the penalties shall go to the king, and the other

price which they would bring *separately*, but when sold in the lump, as the lender must know that he got them to be thus sold.

¹ In *Coomb v. Miles*, 2 Camp. 553, this was held with regard to £.70 worth of ready-made waistcoats, which the discounteer had insisted on the borrower taking in part of the bill, and which the latter had agreed to take, as he expected to make profit by them. A transaction which appears to have been of a similar kind, was sustained in the case of *Aitken and others v. Walker and others*, 1st March 1823, 2 Shaw, 250.

² In the two last cases cited in note 1, there seems to have been no proof that the goods were forced on the borrower; and he therefore undertook to prove that they were valued too high.

³ *Glen v. M'Alpine's Creditors*, 30th June 1790, Morr. 16437.

⁴ 1 Bell, 312; Comyn on Usury, 34, and cases there cited.

It is doubtful whether usury can be proved by reference to oath; *Ritchie v. Lyell*, to note F. C. 477, 22d Dec. 1809.

half to any private informer who may sue for them. This right of recovering penalties is limited to a year from the commission of the offence, with reference to private informers, and two years with regard to the Crown, by 31 Eliz. c. 5, § 5, which enacts these two limitations respectively with regard to the recovery of all penalties. It has been decided¹, in so far as regards this limitation, that this statute extends to Scotland. Whether the limitation (in the event of giving a note in discount for a bill,) should be held to run from the time of giving the note, or from the time when payment of it is received, has been already considered². It has been held, that an action irrelevantly laid within the year, cannot be cured by a supplementary summons raised and executed beyond the year³. The limitation is confined entirely by the statute to the right of suing for the penalties, and has no application to the nullity declared by the statute of Anne, which is subject to no limitation⁴.

These remarks conclude what was to be noticed regarding the import and effect of the words "value received," being the last requisite connected with the form of bills or notes.

13. Rules by which bills or notes are to be construed and to receive effect.

What has been already said explains generally the principles according to which bills or notes ought to be construed. But when a bill or note is granted in one country, and action or diligence is raised on it in another, an international question arises, viz. by the law of which country it ought to be construed, and to receive effect? On this subject it may be stated, *first*, That a bill or note must be construed, and receive effect according to the law of that country where it was to be executed, this being what parties are understood to have in view⁵; or, when that is not fixed, by the law of the country

¹ *Morrison v. Connell*, 24th June 1808, F. C.

² *Ante*, 151.

³ *Morrison's Trustee v. Inglis*, *ante*, 151.

⁴ *Meal v. Thom*, 27th Nov. 1810, F. C.

⁵ Agreeably to this principle, it was decided in the case of *Brown and Son v. Crawford*, 13th June 1761, *Morr.* 1567, that a promissory-note granted in Scotland, but made payable in London, must be negotiated according to the rules of the law of England, which then required the same negotiation of promissory-notes as of bills, although the law of Scotland did not. On this ground the

where it was made. If granted in one place, and payable in another, the law of the place of payment will, for the reason now mentioned, be the rule, although the parties should, at the time of raising action or diligence on it, reside in a different country¹. *2dly*, It has been held in two English

indorsee's representatives were cut off from their recourse against the payee, for want of due negotiation. The same principle of decision was adopted in *Stevenson v. Stewart and Lean*, 14th Nov. 1764, *Morr.* 1618. It seems to have likewise had weight, as one among several pleas, in *Macalpin's Creditors v. Parsons and Govett*, 21st Jan. 1792, *Morr.* 1617; *vide* also *Campbell v. Ramsay Han-nay*, 15th Feb. 1809, *F. C.*, and the cases cited on the same point, *post*, on Prescription, *ad fin.* According to the same principle, it has been also decided in England, that a bill drawn and indorsed in France by a blank indorsement, was not thereby transferred to the indorsee, so as to give him a good right of action, even in England, against the acceptor, as a blank indorsement did not, by the law of France, transfer the right to a bill; *Trimley v. Vignier*, 1 *Bingh. New. R.* 151.

¹ In *Burrows v. Jemimo*, 2 *Str.* 732, where the plaintiff had accepted a bill at Leghorn, but had afterwards got a decree there annulling his acceptance on the drawer's failure, in consequence of a rule at Leghorn that acceptances must be annulled in such a case, when there were not funds of the drawer in the acceptor's hands at the time of acceptance, Lord Chancellor King, on this ground, gave an injunction to stay all procedure at law against the acceptor in England, holding, likewise, that the objection would have formed a good defence in a court of law, if he had gone into it. In *Robertson v. Bland*, *Burr.* 1077, the Court held, that a bill must be judged of by the law of England, as it was made payable in England. In *Potter v. Brown*, 5 *East.* 123, where the plaintiff, having a house at Baltimore, had taken a bill there, which was drawn by a person residing there on a merchant in London, and, (on acceptance being refused,) had brought an action against the drawer, the Court of King's Bench, holding that the drawer had contracted to pay in *America*, if the bill was not paid here, (and on which obligation he was sued,) decided it to be a good defence, that the drawer had subsequently got a certificate under an American commission of bankruptcy, under which commission the plaintiffs had claimed as creditors. The same principle seems to have been followed in an early case, *Da Costa v. Cole*, *Skin.* 272, where, in an action against the drawer of a bill which had been drawn in England on a person in Portugal, payable in milrees, at a period when that coin bore a higher value than it did some time before the term of payment, but the drawee having refused to accept unless at the reduced value, the Court decided that the drawer was liable for the old value, holding, that no change in the law of Portugal, (which had taken place in the interval regarding the coin,) could change an English contract, which this was considered to be with reference to the drawer. In a recent case, *Taylor v. Booth*, *C. and Pay.* 286, it was laid down by Best, *C. J.*, that, when a bill was drawn in Ireland, but payable in England, for a certain sum 'sterling,' this word must be understood to denote the money which was sterling in the place of payment. In *Alves v. Hodgson*, 7 *T. R.* 241, a promissory-note granted in Jamaica was held to be liable to the stamp laws of that country, and was therefore held not

cases¹, that the extent of the remedy by which an English court can enforce an obligation contracted abroad must be regulated, not by the law of England, but by the law of the *locus contractus*. But the principle of these decisions was questioned at the time², and has been since disputed by high authority³.

The true doctrine appears to be, that though the construction of a contract must be determined by the *lex loci contractus*, the law of the country in which action is brought must regulate the mode of enforcing it, because no court can give up its own forms of procedure for those of other countries. Nor does this rule impose hardship on the obligor, since he ought to be aware of it when he contracts an obligation requiring to be enforced in any country where he may reside. In Scotland, this rule has been carried so far, that, although we admit the *solemnities* required in the execution of foreign contracts, the *proof* by witnesses that an English bond was truly executed, though necessary in England, has been held unnecessary when the bond was sued upon here⁴, in respect no such proof is required in the case of a Scotch bond; and, on the same principle, it was decided⁵, that a debt contracted in England, though proveable there by parole evidence, could not be so proved when it was sued for in Scotland. The ground of these judgments appears to be that our courts must follow their own forms, even in judging of foreign obligations,

obligatory here, because not stamped in conformity with these laws. In *Gienar v. Meyer*, 2 H. Bl. 603, the Court of Common Pleas, on like principles, nonsuited certain Dutch seamen in an action against their master for wages, proceeding on a contract by which they had bound themselves not to sue him except in the Dutch courts. The same principle was enforced in a similar case by Lord Ellenborough in *Johnson v. Mackelyne*, 3 Camp. 44.

¹ *Milan v. the Duke de Fitzjames*, 1 Bos. and Pull. 141, and *Talleyrand v. Boulanger*, 3 Vesey, 447. In both these cases it was held illegal to arrest the defendant and hold him to bail on an obligation granted by him to the plaintiff in France, in respect that such a remedy was not competent in France, the *locus contractus*.

² *Per* Heath, J., in *Milan v. the Duke de Fitzjames*, note 1.

³ *Per* Lord Ellenborough in *Imlay v. Ellefesen*, 2 East. 453.

⁴ *Chatto v. Ord*, 10th Jan. 1702, *Morr.* 4447. In a subsequent case, 24th Nov. 1741, *Hendly v. Guillin*, *Morr.* 4465, the same plea was repelled, in respect that it was too late in being urged; but it does not appear what was the opinion of the Court on its merits.

⁵ *Gray's Creditors v. Grant*, 1st Dec. 1789, *Morr.* 4474.

so far as regards matter of proof, though, when foreign writings are once proved, we admit their solemnities as sufficient. There does not, however, appear to be any solid distinction between the proof of a deed and its solemnities, seeing the latter seems to be included in the former ; and, therefore, probably the *lex loci contractus* ought to regulate the *proof* of the contract in the largest sense of that term, in whatever country an action is brought on it. *3dly*, The rules according to which the term of payment is to be reckoned, in the case of a bill or note drawn in a country using one style upon a country using another, shall be considered in discussing the payment of bills or notes.

SECTION III.

*Delivery of Bills or Notes.*1. *Delivery, when necessary.*

A bill or note, when completed in all its parts, is, in general, delivered to the payee.

With regard to the question, how far delivery is necessary to give a right of action on it, 1st, The *person mentioned in a bill or note* as payee does not in general get right to it without delivery. For, while it is in the hands of the drawer or maker, this circumstance affords a presumption, either that it was never issued, (the maker or drawer having full power, till then, to alter its destination or to destroy it,) or, if the term of payment is past, that it has been retired. In England, delivery is held to be implied in the act of making a bill or note, insomuch that the Court of King's Bench¹ decided, *on that ground*, that it was not necessary to aver delivery specially. But it is considered, notwithstanding, as an essential part of the right. For, in a case² where a note was deposited with a banker, with written instructions not to deliver it to the payee till he produced a certain other note cancelled, the payee's right of action on the deposited note was held not to commence till its delivery, and therefore not to be barred either by the intervening bankruptcy and discharge of the granter, or by the statute of limitations, though six years had elapsed from its date. But, when the drawer is likewise payee, delivery is not necessary; and it has been found³, that, if the drawer delivered such a bill to the drawee for acceptance, and the latter admitted that he had accepted, the drawer was not bound, in an action by him for payment, to prove re-delivery by the acceptor, but might give the latter notice to produce the bill. As the bill,

¹ Churchill v. Gardner, 7 T. R. 596.

² Savage v. Aldren, 2 Stark. 232, per Lord Ellenborough.

³ Smith v. Maclure, 5 East. 476.

in this case, was given to the acceptor for a special purpose, it must be held, as soon as that purpose was served, that he retained it only for the drawer, from whom he got it. *2dly*, The case is different with regard to a bill that has been issued, and remains in the hands of the payee or other person entitled to it, with a special indorsation by him to a third party. If a bill or note is found thus indorsed in the payee's repositories after his death, it may be doubted whether the indorsee's right to it can be held completed without delivery. In an English case ¹, a note for £.1000 by a person in favour of his brother, of which the brother knew nothing, and which remained in the granter's custody, till it was found among his papers at his death, was held to form no ground of debt. In another case ², the grandson of a person deceased was found entitled to a bill which the latter had indorsed to him by name, and had delivered, without any special instructions, to his own son, who was likewise his general disponent. But it might be held, in this case, that there was a delivery for the indorsee's behoof. If the indorser is alive, there does not appear to be any ground for holding, that even a special indorsement by him conveys right to the indorsee without delivery. For, until delivery, the indorser has entire control over the bill or note, and it cannot, therefore, be held, that the indorsee has any right, when it depends on the pleasure of another. A bill accepted by a party, and thereafter deposited with the acceptor's agent, is not to be held as delivered to the payee, and cannot afford him action against the acceptor ³. In a case ⁴, where certain bills were seized by a writ of extent, at the instance of the Crown, after being specially indorsed to a third party, and inclosed in a parcel addressed to him, which was given by the indorser to a servant to be delivered to the postman; the Court of Exchequer, notwithstanding, preferred the Crown, holding, that without delivery, the indorsee had acquired no right, as the indorser had still the control of the bills. The same rule would seem to apply, if

¹ Disher, 1 P. Will. 204.

² Carrick v. Key, 6th Feb. 1787, Morr. 17009.

³ Gordon v. Pilmore, 31st Jan. 1724, Morr. 3519.

⁴ The King v. Lambton, 5 Price, 428.

such bills were attached in Scotland by diligence at the instance of other creditors of the indorser, or by a sequestration. With regard to a blank indorsation, there can be no doubt, since it cannot be known, without delivery, for whom it is intended.

Supposing, however, that a bill or note blank indorsed, or payable to the bearer; for instance, a banker's note newly executed, but not issued, were stolen from the maker, would the fact that it had never been issued *by him*, afford him a defence for payment against a *bona fide* holder? It does not appear that bills so acquired, for instance, new notes which have been got by breaking into a bank, should afford less ground of action or diligence against the maker than others.

The want of delivery is a defect not apparent *ex facie* of the bill or note, and therefore creates only a personal exception against the party who has got possession of it without delivery, not a radical nullity of title, such as can follow it into the hands of third parties. A party making an instrument transmissible to the bearer, incurs thereby the risk of its being put into circulation by a person acquiring it casually or fraudulently. The currency of the instrument follows from its terms; and third parties, looking at its terms, have no ground to presume, when they find it in circulation, that it never was truly issued by the maker. The want of delivery would be equally pleadable with reference to subsequent indorsations, since delivery is as essential to the indorsee as to the original payee. But, in both cases, it seems to be only an objection personal against the party who has acquired the bill or note without delivery. The notes of a bank only projected, would, of course, not be effectual, however complete they might be in point of form. But, though they should be thus stolen before the bank commenced business, there would be a claim for payment of them after its commencement.

When a bill consists of several parts, each part ought to be delivered to the payee, (unless one part has been forwarded to the drawee for acceptance, in which case the rest must be delivered,) otherwise there may be difficulty in negotiating the bill, or in obtaining payment¹.

¹ Bayley, 29.

*2. Effect of Delivery, and the Obligations thence arising
against the Party who makes it.*

The making of a note, including its delivery, implies an obligation by the maker to the payee, or any future indorsee, to pay the sum mentioned in it, according to its tenor. On the other hand, the drawing of a bill, including its delivery, implies an obligation by the drawer to the payee, or any future indorsee, that the drawee is capable of binding himself for payment of the bill,—that he is to be found at the place described in the bill as his residence, (if there is a description of it,)—that, if the bill is duly presented to him, he will accept it in writing, according to its tenor, and that he will pay it when due¹. This engagement is absolute, so that, although the drawee should be prohibited from accepting or paying by the laws of a foreign country, in which he resides, the drawer will still be liable in recourse². But he will not be liable, if payment or acceptance has been prohibited by the law of this country³. If any part of his engagement is not performed, for instance, if the drawee refuses to accept, the drawer will be liable in recourse immediately, although the term of payment has not come⁴. Under this claim of recourse, he must pay, not only the

¹ Bayley, 43.

² In *Mellish v. Simeon*, 2 H. Blackst. 378, this point was decided against the drawer in an action of recourse brought against him, in consequence of non-acceptance by the drawee, who had been prohibited from paying by a decree of the French Convention.

³ *Per* Alvanley, C. J., in *Pollard v. Herries*, 3 Bos. and Pul. 340, who lays it down, that “whatever be the nature of the contract into which a subject of this country enters, he is excused from the performance of it if the laws of his country interpose and forbid the performance.”

⁴ In *Bright v. Purrier*, Buller’s N. P. 269, which was the case of a bill payable in 120 days, an action of recourse against the drawer, on account of non-acceptance, was admitted before the bill became due. In *Milford v. Meyer*, 1 Dougl. 54, the same rule was followed against the drawer, on the ground, that what he “had undertaken has not been performed, the drawee not having given him the credit which was the ground of the contract.” Reference may also be made to *M’Carty v. Barrow*, 2 Str. 949, and *3 Wilson*, 16, *per* C. J. Wilmot, where it was held, that the drawer’s liability was a debt contracted at the time of drawing the bill, though it did not require to be enforced till non-acceptance or non-payment. In *Workman v. Leake*, 1 Camp. 22, it was decided, that the indorser of a promissory-note was freed from his obligation as indorser, by a discharge under the insolvent act, seeing the note was dated be-

principal sum in the bill, with interest and expenses, but also exchange or re-exchange, in so far as these are incurred by non-payment of the bill¹. But the full extent of this claim of recourse, as well as the mode of enforcing it, shall be explained afterwards, in considering the remedies competent against the parties to bills or notes.

From a rule already explained, viz. that the obligations of parties to a bill or note must receive effect according to the law of the place where they are to be made payable, or, if no place of payment is specified, where they were contracted, it follows, that if the drawer's obligation is discharged in the country where the bill was drawn, (as by a certificate of bankruptcy obtained there²;) he cannot be sued on it elsewhere; for he engages to pay the bill, on the drawee's failure, at the place where the bill was drawn, and therefore his liability must be regulated by the laws of that place.

3. As a counterpart to the obligations now mentioned as incumbent on the drawer of a bill, the payee undertakes others, by the mere act of receiving the bill. These are generally to negotiate the bill, or, in other words, to take proper measures for obtaining acceptance and payment, and to protest it, as well as to give the drawer and previous indorsers due notice in case of non-acceptance or non-payment. But the particulars of due negotiation shall be afterwards explained. At present we shall only consider the extent to which these obligations are binding on the holder, and the result of his failure to perform them. By such failure he loses his recourse against the drawer on the bill, in case of its non-acceptance or non-payment.

Besides, if he has taken the bill on account of a prior debt, it is to be considered how far his failure in negotiation will not only cut off his recourse on the bill, but extinguish the debt.

In Scotland, it would appear, that, in such a case, scarcely

fore the discharge, his obligation being thus held to subsist from the date of the note. The same doctrine seems to have been implied in *Stacey v. Barnes*, 7 East. 438, though the case was decided on another ground.

¹ In *Mellish v. Simeon*, 162, note 3, where the bill was drawn at London on Paris, the drawer was found liable to the holder in the re-exchange between Paris and London.

² *Potter v. Brown*, 5 East. 123; 156, note 1.

any want of negotiation was at first sufficient to extinguish the previous debt, and, for many years, the law was in a state of great uncertainty on the subject¹. But the later decisions appear to have finally settled, that failure in due negotiation and notice by the holder of a bill or note not only extinguishes his claim on the bill or note, against the previous parties to it, but cuts off his claim even for the previous debt in satisfaction of which it was given. Thus², where a creditor holding a bill as a deposit, in security for advances, neglected to protest it, or to give notice of non-payment, and the acceptor became insolvent, the Court of Session held that he was not accountable for its amount to the party who gave it to him. But the House of Lords, proceeding apparently on the ground of neglect, held that he was accountable for it. In another case³, where the indorsee of an inland bill, who got it in payment of previous advances, had failed in due negotiation, and where the drawee had become insolvent before any protest was taken against him, the Court found that recourse against the indorser was cut off, disregarding the argument which was used in a previous case⁴, that an indorsee in security was not liable in strict negotiation. The question here seems to have occurred in a charge on the bill, and not, as in that case, in an action for the sum due. It was also decided in a subsequent case⁵, by the House of Lords, that a bill indorsed in security required strict negotia-

¹ In the former edition a detail was given of the earlier decisions on this subject. This has been now suppressed, as no longer necessary. But those who wish to study the history of the law on this subject, may consult the following decisions: *Lindsay v. Gray*, 24th July 1629, *Morr.* 1543; *Earl of Newburgh v. Stewart*, 27th July 1666, *Morr.* 1543; *Henderson v. Muireson*, 25th July 1701, 4 *Brown's Suppl.* 507; *Swinton v. Craigmillar*, 28th June 1706, *ibid.* 528; *Brown v. Home*, 14th Nov. 1705, *Morr.* 1546; *Hay v. Hall*, 6th July 1697, *Morr.* 11520; *Brand v. Yorstoun*, 10th July 1706, *Morr.* 1549; *Oswald v. Gordon*, 26th July 1711, *Morr.* 11521; *Earl of Leven v. Glencairn*, 20th Dec. 1711, *Morr.* 1553; *Alexander v. Cumming*, 19th Jan. 1756, *Morr.* 1582.

² *Murray v. Grosset*, 16th Feb. 1762, *Morr.* 1592.

³ *Falls v. Porterfield*, 14th Nov. 1764, *Morr.* 1593.

⁴ *Alexander v. Cumming*, 10th Jan. 1758, *Morr.* 1582.

⁵ *Reid and Co. v. Coats*, 21st Feb. 1794, *Morr.* 1620; 6 *Brown's Parl. Cas.* 264.

tion ; and the holders were found to have forfeited, by neglect to negotiate it properly, all claim even on a former bill in security of which it was granted, although they had granted a receipt for the last bill, stating that the person who gave it should not be discharged till it was paid. These decisions appear to lead to this result, that, when a bill or note is taken in payment or satisfaction of a debt, any failure in negotiation cuts off not only the holder's recourse on the bill or note, but his claim for the original debt. The converse of this doctrine is, that, if the bill or note be duly negotiated, though not paid, the creditor's original claim, as well as his recourse on the bill or note, remains entire. This last point was expressly decided in one case¹, where a party who was creditor to another in a bill having given it up, on receiving a draft from the debtor for its amount on a third party, was found entitled, notwithstanding, to recourse against the drawer of this last bill, (having duly negotiated it,) on the drawee failing to pay it.

These rules are substantially the same with those established in England. First, it has been there held, that the mere taking of a bill or note by a creditor from his debtor does not imply novation of the previous debt, unless that is expressed², or perhaps, unless it is implied from the nature of the transaction³, but will be considered only as an addi-

¹ *Johnston v. Murray*, 1st Feb. 1715, *Morr.* 1556.

² In *Taylor v. Wasteneys*, 2 Str. 1218, it was held that the right to follow out an action, which had been raised for a debt, remained, notwithstanding a note for £.20 which had been given subsequently by the debtor to the creditor. In *Scott v. Surman*, Willes, 406, the Court of King's Bench decided, *inter alia*, that the taking of a note by a factor for the price of goods consigned to, and sold by him, did not innovate the debt, so as to exclude the consigner from claiming for the price. In *Drake v. Mitchell*, 3 East. 451, this was also decided with regard to bills, which were not proved to have been taken in satisfaction of the previous debt.

³ This exception received effect in an old Scotch case, *Stuart v. Blackwood*, 4th Dec. 1684, 2 Bro. Suppl. 67, where two partners having commissioned wine, and desired the seller to draw on them for the price, which he did, but only one of them having accepted, and having alone received the wine, and the bills being also protested only against him for non-payment, the Court found that the seller was not entitled, after the lapse of six years, to sue the other partner for the price. It was thus held that he had taken the acceptor of the bill as his sole debtor.

tional security. Thus it has been decided¹, that taking a note for the balance of a debt does not cut off a claim for interest on another security previously granted for the same debt, the note being held, in these circumstances, to be merely an acknowledgment. It has been also held², that the circumstance of a traveller taking an acceptance for a debt from the defendant, but with an intimation that he did not think it would be received, and sending it to his constituent, who retained it, but without any drawer's name being filled up, did not preclude him from suing for the debt, though it afforded evidence of that debt. It has been decided, too, that the lien which the seller of lands has over them, by the law of England, for the price, is not relinquished by his taking bills or notes for it, unless it appears that he meant to rest entirely on that security³. Farther, when a party agrees to take a new bill as a substitute for a previous one, on which action had been raised, on condition of the defendant paying costs, but this last condition is not fulfilled, it has been held⁴, that the original bill is still available. Lastly, if a person takes new bills in satisfaction of previous bills, retaining the former, however, in his possession, it will not be held that the last are absolutely substituted for the first, but the creditor will be entitled to sue on the first bills, if the last are not paid⁵.

¹ *Curtis v. Rush*, 2 Ves. and Beames, 416.

² *Vyse v. Clarke*, 5 C. and Pay. 403.

³ In *Ex parte Loaring*, 2 Rose's B. C. 79, this was held, although the seller had taken and discounted a note for the price at four months, which, however, he had himself been obliged to pay, and also in *Grants v. Mills*, 2 Ves. and Beames, 306. In *Hughes v. Kearney*, Schoales and Lefroy, 136, Lord Redesdale, then Lord Chancellor of Ireland, held that the seller must be presumed to retain his lien over the lands, unless it appeared that he had agreed to rely on the collateral security.

⁴ *Norris v. Aylett*, 2 Camp. 328, *per* Lord Ellenborough. In this case, the plaintiff, who had discounted and been obliged to retire the substituted bill on its being dishonoured when due, gave it up to the debtor, and had a verdict for the amount of the original bill. But the last bill was dishonoured after the action had been raised, so that the action truly rested on the non-performance of the agreement as to costs. But *vide* *Dillon v. Rimmer*, 1 Bing. 100, where the contrary was found under nearly similar circumstances.

⁵ *Ex parte Barclay*, 7 Vesey, 597. This was decided by the Lord Chancellor, with regard to a claim made on the first bills against the debtor's bankrupt estate. The same doctrine was likewise held in the case of *Bishop*

In a Scotch case¹, where a party who had first got a bill for certain advances made by him on a ship, afterwards took a bond of bottomry, which, so far as regarded the contents of the bill, turned out to be ineffectual, the Court of Session, adopting the doctrine now stated, held that his right to sue on the bill was entire. On the other hand, when the creditor takes a bill or note in satisfaction or payment of his debt, this is held, in the meantime, equivalent to payment. In a case², where a shipowner, who had a lien on the freighter's goods for payment of the freight, had stipulated that part of it should be paid in "good and approved bills" at three months, and afterwards took a bill for this money, and negotiated it, though he refused in words to receive it, as being a bad bill, the Court of King's Bench held, that, by negotiating the bill, he must be held to have accepted of it in payment, and to have renounced his *lien* on the goods. From what has been now stated, it follows that, when a creditor has taken a bill or note in payment, he cannot sue on the original debt till the bill or note has become due, and has not been paid³, unless it is known at once to be bad, or has been returned to the original payee by

v. Rowe, 3 M. and S. 362, although the dishonour of the last bill had not been notified to the drawer of it. But the point of notice shall be considered afterwards. In a later case, *Lambourne v. Cork*, 1 D. and R. 211, where a creditor agreed to discharge an execution on getting £.40, whereupon he got a note for that sum, and granted a release of all suits, proceeding on the narrative of £.40 being paid, "as after mentioned," he was, notwithstanding, found entitled to sue the defendant, who granted the note, for payment, the discharge being held to depend on the condition of its being paid.

¹ *Sword v. Howden and Gardner*, 27th June 1826, 4 S. and D. 757.

² *Horncastle v. Farren*, 3 B. and Ald. 497; *vide* also to the same effect *Duncan v. Johnstone*, 16th May 1827, F. C.; and in England, *Burney v. Poynts*, 1 Nev. and Man. 232.

³ This rule was laid down by Lord Kenyon in *Stedman v. Gooch*, 1 Esp. 3, although the circumstances of the case were held to take it out of the rule. The same rule was followed in *Rex v. Dawson, Wightwick*, 32; it being held that an extent in aid could not be issued, on a debt for which the creditor took a bill, which had not fallen due at the date of the inquisition. *Vide* also *Kearelake v. Morgan*, 5 T. R. 513, where, in an assumpsit for the price of goods sold, it was held a sufficient answer by the defendant that he had indorsed a note for, and on account of, the goods. Reference was made in the same case to *Richardson v. Bickman*, decided in 16 Geo. III, where similar effect was given to taking a bill of exchange by the creditor in satisfaction of his debt, the bill being drawn by him, and accepted by the debtor, and not yet due. In *Kendrick v. Lomas*, 2 Cr. and Jerv. 405, 2 Tyrwh. 438, where the plaintiff

a party to whom he indorsed it, without money passing, and remained ever since unpaid in the payee's hands¹, or the bill, while unindorsed, is lost, and no demand is made on it², in which cases the debtor may be sued immediately on his original debt³, or where it has been given for a smaller sum than the debt, in which case the debtor may sue for the difference⁴. Excepting in these cases, the creditor, before being allowed to sue on the original debt, must prove that the bill or note has

took a second bill as a renewal of the first, two days before it fell due, and afterwards brought an action on the first bill, before the second became due, and without delivering it back, it was held that he could not recover. In *Tomlin v. Laurence*, 3 M. and Pay. 555, an indorsee of a bill accepted by the defendant to one of two partners for a debt due to both, was held entitled to sue for it, as no claim could be made against him by either of the partners for the debt, unless the bill was dishonoured.

¹ *Burden v. Halton*, 1 M. and Ryl. 223; 4 Bing. 454.

² *Rolt v. Watson*, 4 Bingh. 273.

³ In *Stedman v. Gooch*, 1 Esp. 3, an action brought for a debt, after taking three notes in satisfaction of it, was sustained, although the notes had not fallen due, they having turned out to be of no value. Similar doctrine was laid down by Lord Ellenborough, in the case of *Mussen v. Price*, 4 East. 147, where the buyer of some goods having agreed to give the seller, at the end of three months, bills for the price at two months longer, his Lordship held, that the credit given depended on the granting of these bills, and that, therefore, when they were not granted, the buyer might be sued *immediately* for the price. But the other Judges held, in the circumstances of the case, that there was, at all events, a credit of five months, (independently of granting the bills,) and that the seller could only claim the damage arising through their not being granted. The same doctrine was also laid down by Lord Ellenborough, in *Nickson v. Jephson*, 2 Stark. 227. In an earlier case, reported in 12 Mod. 517, it was laid down, that, if the seller of goods takes a goldsmith's note in payment, this will be good payment, though the goldsmith were worth nothing, provided the buyer did not know it; but that it will not be good if he did know it. Such a note, however, would not be a good payment at all events, whether the person giving it knew of the goldsmith's failure or not. This appears to be settled by the case of *Owenson v. Morse*, 7 T. R. 64, where a person, who had sold goods, and taken in payment certain notes on a banker who failed that day, was found entitled to stop the goods *in transitu*; and in *Bishop v. Shilleto*, 2 B. and A. 329, where the same decision was given regarding the sale of iron, in payment of which bills were given which had not been retired. In *Puckford v. Maxwell*, 6 T. R. 52, where drafts had been taken, in payment of a debt, which were dishonoured, on the ground that the drawer had no effects in the drawee's hands, the creditor was found entitled to follow out diligence on the original debt. The same decision was given in *Wilson v. Vysar*, 4 Taunt. 287, and in *Cundy v. Marriot*, 1 B. and Ad. 696, where a bill, written on a wrong stamp, had been indorsed in payment of the price of goods.

⁴ *Thomas v. Heathorn*, 2 B. and Cr. 477; 3 D. and R. 647.

sidered as taking the entire risk of this bill or note on himself, even though he has granted a receipt in full for the previous debt, on taking it¹. If the creditor get a draft for his debt on bankers, desiring that it should be paid by a bill at seventy days, but, instead of taking such bill, allows the bankers to transfer the amount to his own account with them, this is held the same thing as if he had got the money, and

accommodation, when he might have had cash, he has no separate claim for the debt; *Strong v. Hart*, 6 B. and Cr. 160. In *Robinson v. Read*, 9 B. and Cr. 449, where a creditor for furnishings on account of a ship, took a bill from the ship's agent for the amount, allowing discount, and afterwards renewed it to him twice, with interest, but where he did not appear to have preferred this arrangement, and where the principal had not looked into the agent's accounts, or given him credit on account of the arrangement, though the latter had funds of his more than sufficient to have paid the debt, the creditor was found to have a good claim against the principal. In *Taylor v. Briggs*, 1 M. and Malk. 28, an action was successful on a charter party against the charterers, when the freight was by the charter party, to be paid, partly in cash, and partly by approved bills, though the creditor had, without the knowledge of the charterers, taken a bill for the freight from the consignee, which was dishonoured. In *Wyatt v. Hertford*, 3 East. 147, the plaintiff having got a draft from the defendant's steward on a banker, in payment of work done for the defendant, and on this draft being dishonoured, having, without informing the defendant, taken a new draft from the steward at twenty-one days' date, on non-payment of which he brought his action for the debt, the jury first found for the defendant, under the direction of Lord Ellenborough, C. J.; but afterwards, his Lordship said, that there must be a new trial, as it did not appear that the defendant had acted towards the steward on the supposition of the debt being paid. In other words, he had not suffered any injury through want of notice. In *Evrett v. Collins*, 2 Camp. 515, a sub-agent of the defendant, who owed the plaintiff money, having given his son in payment a draft on his bankers, which was dishonoured, because the agent had overdrawn his account, and the agent having failed the same day with funds of the defendant (beyond the amount of the debt) in his hands, the defendant was, notwithstanding, found liable for the debt, it being held that the draft by his agent was the same as a draft by himself. No regard was paid to the plea, that the plaintiff's son might have had money if he had chosen, but preferred a check. It was evidently implied that the check must be a fair one, which this was not. The same doctrine was adopted by Best, C. J. in *Hadwen v. Mendizabal*, 2 C. and P. 20, where the seller of goods was found entitled to sue for the price, though he had taken a bill for it, which was dishonoured, and was then lying protested in the hands of his agents; and in *Burden v. Halton*, 4 Bingh. 454, where two bills which had been given in payment of the price of goods, having been delivered by the holder to a third party, but afterwards returned to him, without proof of any consideration passing between them, he was held to have a good action for the price of the goods, in respect of the bills not being paid.

¹ *Popley v. Ashley*, 6 Mod. 147.

afterwards deposited it with the banker, and therefore the debtor will be released¹. But the decision will be opposite if there has been no such transference to the creditor's account². In a case³ where the plaintiff paid into one country bank certain notes of another bank, and the former bank, on sending them to the latter, instead of taking cash for them, allowed them to be placed to their own credit, and permitted the receivers to re-issue them, the Court of King's Bench decided that they had taken the risk of them, and must be liable for them to the plaintiff as for cash. If the debtor pays his debt by a draft on his bankers, and the creditor, on being asked by them, whether he will have cash or a bill or draft, prefers the latter, it is at his risk, unless there is manifest fraud, as where the bankers give him a bill signed by a party whom they know to be insolvent, or a draft on a house which has none of their effects⁴. But, if a bill is given him without

¹ This was the *species facti*, and the decision, in *Bolton v. Richard*, 1 Esp. 106; 6 T. R. 139. In *Vernon v. Bouverie*, 2 Shower, 295-6, the plaintiff having got notes from a debtor of his on his banker, (on receiving which he discharged the debt,) and, on being asked by the bankers, upon discounting the notes, whether he would have cash or notes, having preferred notes, he was non-suited in an action for the original debt, brought against the debtor, in consequence of the non-payment of these notes. In another case between the same parties, where the plaintiff had preferred getting up a small bill which he owed the bankers to receiving cash from them, he was likewise non-suited, on the ground of his having thus discharged the original debt.

² In *Brown and Richard v. Kewleys*, 2 Bos. and Pull. 518, where the buyer of some goods had given the seller in payment a draft on his bankers, payable at two months, by a bill to be given at two months thereafter; but the bankers failed before the expiry of the first two months; the circumstances of the case being held not to infer that the creditor, (who had likewise an account with them as his bankers,) had given them any new credit for the amount of the drafts, a verdict was found for him, in an action on the original debt, and the Court of Common Pleas affirmed it.

³ *Gillard v. Wise*, 5 B. and Cr. 134; 1 D. and R. 523.

⁴ The rule here stated is illustrated by the case, (already cited,) of *Vernon v. Bouverie*, 2 Shower, 295-6. In the case, also, of *Marah v. Pedder*, 170, note 2, Gibbs, C. J., expressed an opinion, that, if the plaintiff had been offered cash, and had preferred a bill, the bill must have been at his own risk. The same rule was laid down by Bayley, J. in *Emly v. Lye*, 15 East. 13, per Lord Kenyon, C. J. in *Owenson v. Morse*, 7 T. R. 66, and by the Court of King's Bench, in *Smith v. Ferrand*, 7 B. and Cr. 10, where a rule nisi for a new trial was discharged on that ground. On the other hand, (with reference to the exception of fraud now stated,) in *Evrett v. Collins*, 2 Camp. 515, a check was found to be no payment, when given on a bank on whom the granter

the choice of payment in cash, as where the draft which his debtor gives him on his bankers bears that they are to pay him by a bill, his original claim will remain, if this bill, though duly negotiated, is not paid¹. These rules are applicable to the case of bills or notes granted for the price of goods sold, or for any other consideration at the time, as well as in satisfaction of previous debts; and, indeed, they have been already illustrated by decisions taken indiscriminately from both descriptions of cases². It has been held³, that, if a person gets a negotiable note for money lent, he cannot, without producing it, recover on the original consideration, though the note should be lost; because the note may be still in circulation, and thus, (unless it were produced,) the defendant

had already overdrawn, although the creditor's son who got it had preferred it when he might have had bank-notes. Farther, with regard to the case of a banker giving bills, Lord Kenyon, C. J., observed, in *Bolton v. Richards*, *post*, note 1, that, "if Caldwell and Company," (the bankers drawn upon by the debtors in that case,) "had given the plaintiff a bill on an *insolvent person* for 'the amount of the plaintiff's check on them, it would have been too much' perhaps to have said, that that would have cancelled the plaintiff's demand."

¹ *Ex parte* Dickson, cited in *Bolton v. Richards*, 6 T. R. 142. There the buyer of some sugars, (who had promised to pay the price by a good bill at two months,) having given the seller a check on his bankers, desiring them to pay him by a bill at three months, whereupon they gave him drafts on their bankers in London, who failed before the draft became due, and the drawers as well as the original debtor having likewise failed, the Lord Chancellor (Thurlow) directed, that the creditor should rank first on the estates of the two banking houses, and then for the residue of the debt on the estate of the primary debtor, holding that his draft was not a complete payment, but that he was still liable. In *ex parte* Blackburne, 10 Vesey, 204, the buyer of some goods, (in virtue of an agreement by him to pay the price by bills at three months,) having given the seller a check on his bankers, who did give him a bill at three months, but the acceptors of it, and the drawers as well as the original debtor, having all failed, the seller, after ranking on the estates of the two former, was likewise permitted by the Lord Chancellor to rank for the balance of his debt on the estate of the latter. It was argued, that the original debtor must be considered as discharged, since the seller had taken a bill in terms of the agreement with him, without requiring his indorsement. But the contrary was held; and it was also held, that the creditor might claim on the estate without being bound to give up the bill. It is said by Chitty, p. 202, note c, that *Bolton v. Richard* seems contrary to these cases. But the previous statement of it shews that its circumstances were altogether different.

² *Vide* on this subject *Owenson v. Morse*, and *Bishop v. Shiletto*, 168, note 3, and *Brown and Richard v. Kewley*, 172, note 2.

³ *Dangerfield v. Wilby*, 4 Esp. 159, *per* Lord Ellenborough.

might be subjected to double payment. The contrary has been found, where the bill is in his power, as when it is lying protested in the hands of his agent¹. But the rules, with regard to the production of bills or notes, shall be explained more fully afterwards.

It has been found², that, when an account is settled, and a bill on a third party given for the sum due, the account cannot afterwards be disputed even in an action brought for its amount, upon the non-payment of the bill.

4. *Assignment of funds by delivery of a bill or note.*

But, besides the obligations which delivery of a bill or note creates betwixt the drawer and payee, the drawing and delivery of a bill, when properly intimated to the drawee, operates an assignment to the payee, to the amount of the bill, of any sum which is due by the drawee to the drawer. This assignment, to be effectual, must be intimated to the drawee, by presentment of the bill. This doctrine has been settled by a number of cases already cited³, in which the date of intimation has been always adopted as the criterion of preference. Reference has been made to the opinion of two of our most eminent writers⁴, which is said to be inconsistent with this doctrine. But that opinion, which imports that bills may be *transmitted* without intimation, evidently refers to their indorsement; and, if it is held to refer to the indorsement of *accepted* bills, (as it may fairly be, since bills are generally accepted before being indorsed,) it is, as will afterwards appear, correct, with reference to the assignment by indorsation of the

¹ Hadwen v. Mendizabal, 5 C. and Pay. 20.

² This was decided by Lord Kenyon, 1 Knox v. Whalley, 1 Esp. 159. The contrary appears to have been decided in an old case, Cbancellor v. Dorset, Finch, 431, where an accounting between two partners was opened up on the ground of error, after a note had been granted, on a settlement, for the balance due, and a verdict was found in another action for its amount, with costs. But this case will not outweigh the later decision. The case of Trueman v. Hirst, 1 T. R. 41, referred to by Chitty, 197, note, does not appear to be in point; since the only question there was, whether a note *granted by an infant* could prevent the settlement of accounts on which it was granted, from being afterwards opened up.

³ *Ante*, 66.

⁴ Stair, i. 11, 7; Ersk. iii. 5, 6. *Vide* also Forbes, 166, whose doctrine shall be afterwards noticed.

funds in the acceptor's hands. At all events, it has no connection with the assignment of these funds to the payee, by *drawing* the bill. In another passage ¹, Lord Stair seems to consider intimation unnecessary with regard to assignments granted by merchants abroad, to transfer goods which are in Scotland; and he refers to an old case in support of this doctrine. But such a rule would not be followed, even with regard to a bill drawn abroad on a person in Scotland, considered as an assignment of the drawer's money in the drawee's hands. The rule in such a case is, that the law of the country where the assignment is to be completed prescribes the forms necessary for its completion; and that, therefore, the bill must be intimated by presentment to the drawee. Such presentment, as already shewn ², must, in general, be proved either by his acceptance, or by a protest for non-acceptance. In the case of a bill drawn payable at a particular place different from the drawee's residence; for instance, at a certain banking house, a protest taken at this place does not appear sufficient to carry the drawer's funds in the drawee's hands, unless there is proof that the draft was intimated personally to the drawee; for here, as in other assignments, the transference, in order to be complete, must be made known to the debtor. But although a protest, in case of non-acceptance, is the most common, it is not perhaps the only mode of proving presentment. In one case ³, verbal intimation of a draft was held sufficient in a question between the payee and the drawee. But in competition with a third party, as with an arrester of the drawer's money in the drawee's hands, no evidence short of a protest for non-acceptance has been admitted ⁴. Perhaps a marking on the bill, a letter by the drawee admitting intimation, or other written evidence, might be sufficient; but it would be unsafe to rely on any but that which has been already sanctioned. It is said by a learned author ⁵, that verbal acceptance, even by anticipation, is sufficient to transfer the fund in the drawee's hands. But such evidence has been rejected in a recent case ⁶.

¹ S. iii. l. 12.

² *Ante*, 66.

³ *Fairholm v. Gordon*, 1st Feb. 1724, *Morr.* 1462.

⁴ *Vide* the cases, as cited, 66, note 4.

⁵ 1 *Bell*, 398.

⁶ *Cullen*, 18th June 1838, 11 S. D. B. 733.

Intimation of the bill to the drawee, when fully proved, completes the assignment¹. But,

1st, A bill so drawn can only carry money in the hands of the drawee, not money in the hands of bankers at whose house the bill is made payable².

2dly, Such a bill carries only money, not other effects belonging to the drawer in the drawee's hands. It has been held³, that an inland precept, whereby the drawer desired his correspondent to account to a third party for a quantity of meal and iron belonging to him, is only an ordinary assignation, in competition with an arrestment of the same effects. The arrester seems to have admitted a doctrine, which is now overturned, viz. that a bill would have carried *money* in the drawee's hands without intimation; and the precept, in this case, was postponed to the arrestment for want of intimation, solely because it was not a bill, as it did not relate to money. In a much stronger case⁴, of a draft for money which had been protested by the payee for non-acceptance, and was valid as a bill, it was, notwithstanding, found not to carry the drawer's effects in the drawee's hands in competition with a posterior arrestment, in respect that these effects, consisting of a cargo of fish, had not been turned into money at the date of the protest. The ground of this decision, as explained in the report, seems to have been, that a bill is only an assignation to a sum of *money* due by the drawee to the drawer, and that therefore it cannot take effect when there is no money due, though there should be effects for which he is accountable. The drawee was not bound to accept the bill, (as the arrester pleaded,) nor was liable in damages for non-acceptance, so long as the effects were not turned into cash; and

¹ Such is the law regarding the effect of presentment in Scotland. It has occurred recently in consultation, whether the same effect would follow from presentment of a bill in England, to carry the drawer's funds *there* in the hands of the drawee; and I have reason to believe, that presentment of a bill in England to the drawee would not have this effect. But this is a point of English law, on which I cannot hazard an opinion.

² This was decided in *Macleod v. Crichton*, 14th Jan. 1779, *Morr.* 16469, with regard to the effect of a bill made payable at the house of Sir William Forbes and Company, in assigning funds in *their* hands belonging to the drawer.

³ *Anderson v. Turnbull*, 19th July 1706, *Morr.* 1460.

⁴ *Stewart and Ewing competing*, 15th June 1744, *Morr.* 1493.

this shewed that the bill was merely an assignment of money. It was admitted that the bill, being a continued mandate, would have ultimately given the payee a right to the money arising from the effects, if there had been no impediment. But it did not operate as an assignment at the date of the protest, seeing the effects were not *then* turned into money, and, in the meantime, they were legally attached by the arrestment. These doctrines seem to follow from the nature of bills, since a bill, relating to money alone, cannot be held to imply an assignment of effects. No doubt, as it implies a continued mandate on the drawee to pay money, it will, if intimated, effect an assignment of cash in his hands, when he realises it. But this cannot happen when *the effects* are, in the meantime, attached by diligence. In England, it is held, that a payee has no direct interest even in bills or other effects deposited by the drawer with the drawee to cover his drafts, though it has been found, that, should the drawee, after acceptance, and also the drawer, both become bankrupt, the payee may get payment indirectly through these effects, by the right of the acceptors or their assignees to retain them till the drawer's assignees become bound to relieve them from the bill¹. But,

3dly, It has been held in Scotland², that a protested draft on bankers for value in account, implied an assignment to the payee of the *nomen debiti*, arising from another draft by the granter of the draft first mentioned on a third party, which draft had been deposited in the banker's hands to get payment, but was not yet due.

4thly, A bill protested for non-acceptance will be preferred to a posterior arrestment, and also to a trust-deed for behoof of the drawer's creditors executed before the date of the protest, but not intimated to the drawee till after it³, when money is certainly *due* by the drawee to the drawer at the date of the protest, though not immediately exigible⁴. But if the drawee

¹ Chitty, 264. The point now mentioned was decided by the Lord Chancellor in *ex parte Waring* and *ex parte Inglis*, 2 Rose's B. C. 182; also *Perfect ex parte*, Montagu, B. Cases, 25.

² Macleod v. Crichton, *ante*, 176, note 2.

³ Falconer v. Campbell, 22d Jan. 1824, 3 S. D. 630.

⁴ This was decided in *Campbell, Thomson and Co. v. Glass and Son*, 28th May 1803, Morr. App. to Impl. Assign. p. 3.

should, at the time of the protest, owe the drawer less than the amount of the draft, the protest will not carry even the sum due, if the payee does not intimate his willingness to take such a sum as the drawee admits, or is inclined to pay ¹. His protest is, in that case, a refusal to take any thing unless he gets the full amount of the bill, and therefore the drawee is at liberty to dispose of the funds.

The date from which the assignment implied in the delivery of a bill or note becomes effectual, not in competition with diligence or other assignments, but with reference to bankruptcy, shall be discussed afterwards ².

The effect of the indorsement of a bill, (to be afterwards noticed,) in transferring the drawer's money in the drawee's hands to the indorsee, depends on the same principles as the implied assignment now mentioned to the payee.

¹ *Hogg v. Fraser*, 29th Nov. 1786, *Morr.* 1521.

² *Vide* Chapter on Bankruptcy.

SECTION IV.

How far alterations can be made in Bills or Notes, before or after delivery, and what is their effect.

1. Alterations at common law.

Independently of the stamp laws, any alteration in a material part of a bill or note, made after it is issued, unless with consent of all parties, or for the correction of a mistake, renders it void; for the bill or note as altered is not the instrument which the parties subscribed; and while it no longer affords evidence of what it originally was, parole evidence cannot, consistently with the law of written obligations, be admitted. This principle is equally applicable, whether the alteration was made by any of the parties, or by a stranger. Thus, it is settled in England¹, that an alteration in the date of a bill, payable three months after date, from 26th to 20th March, made by some person unknown, while it was in the hands of the payee, rendered it void, even in the hands of an onerous indorsee. A similar decision², proceeding partly on the authority of this case, was pronounced in Scotland against a charge by an onerous indorsee, on a bill payable two months after date, of which the date had been altered from 7 to 17, though it did not appear by whom, or for what purpose. It seems, however, to follow from the principles settled with regard to alterations in the sum³, that no alteration in a bill or note will render it invalid in the hands of an onerous indorsee, unless when the alteration is visible *ex facie*. This was the ground of decision in a case already cited⁴; and, in the two cases now referred to, the alteration in the date was visible *ex facie*. When this is the case, an indorsee is himself to blame if he takes the bill; but otherwise he has a just claim against the previous parties for giving it currency,

¹ *Master v. Miller*, 4 T. R. 320; 2 H. Bl. 141.

² *Murchie v. Macfarlane*, 1st July 1796, Morr. 1458.

³ *Ante*, 70.

⁴ *Graham v. Gillespie*, 70, note 3.

while so carelessly written that an alteration could be made on it without attracting notice. The case of alteration by erasure is different, because the grantor or drawer of the bill or note is not to blame for it. In the case of a bill¹, payable four months after date, which bore to be dated on 25th December 1793, the Court of Session, on the ground of the figure 5 in 25, (whether erased or not,) being evidently superinduced, or written over some other figure, held, that this vitiation annulled the bill, even in the hands of an indorsee's representative. The bill had been saved from prescription by diligence raised on it in the year 1794.

An alteration is accounted material when made in the date, especially of bills payable after date², or the sum³, or the

¹ *Hamilton v. Monteth*, 1 Dec. 1824, 3 S. and D. 345.

² *Vide Cases*, 179, notes 1 and 2; and also *Outhwaite v. Luntley*, 4 Camp. 179, being the case of a bill, payable three months after date, which was held, (in an action by the indorsee against the indorser,) to be vitiated, by an alteration of its date from 5th to 15th March, though the alteration was made by the drawee, without the drawer's knowledge, after indorsation, but before acceptance. *Vide* on the same point *Allan v. Young*, 5th March 1800, *Morr. App. v. Bill*, 14, where the date was altered from 1788 to 1789, so as to bar prescription. In this case, it was doubted whether the holder of the bill, according to his own statement, could be regarded as an onerous indorsee. In the later case of *Russell v. Macnab*, 14th Dec. 1822, 2 S. and D. 88, action on a bill was dismissed, in respect that the date had been altered from 1811 to 1814, though the pursuer referred the debt to the defender's oath, but reserving action for the debt. The same doctrine was held in *Hamilton v. Monteth*, 1st Dec. 1824, 3 S. and D. 345, and *Corrie v. Barbour*, 26th Nov. 1825, 4 S. and D. 228, where the date of a bill was said to have been altered from 1st to 8th October 1819. A previous decision, *Stewart v. Bird*, 14th Nov. 1822, 2 S. and D. 13, whereby a suspension, founded on the averment that the date of a bill had been altered, was refused, seems to be very questionable. If the Court are satisfied, from looking at the bill, that there is no vitiation, they will not proceed on a mere allegation to that effect; *Dobie*, 3d June 1823, 2 S. and D. 358, and the preceding case of *Stewart*. But it does not appear easy to exclude an express offer to prove vitiation, merely on the ground that the bill does not seem to be vitiated; See also *Walton v. Hastings*, 4 Camp. 223, where a bill, payable three months after date, was held to be null by an alteration of the date from 5th to 10th July, and *Bishop v. Chambre*, 1 M. and Malk. 117.

³ *Vide Graham v. Gillespie and Co.*, ante, 70; *vide* also opinion of Grose, J., in *Master v. Miller*, 179, note 1; *vide* also *Taylor v. Mosley*, 5 C. and Pay. 273. In *Leith v. Elphinstone*, 16th Jan. 1734, *Elchies*, No. 1. v. *Writ*, the Court held a bill vitiated and null, on finding by inspection that the sum had been altered by the creditor, in whose handwriting it was, from 58 marks to 50 and 18 marks.

time of payment¹, or in the rate of interest², or in the drawer's name³, or that of an indorsee⁴, or by erasing the name of one of two acceptors⁵, or by inserting a specific consideration in a bill or note which was granted at first generally for value received⁶, or by changing the place of payment men-

¹ *Murdoch v. Lee, Rodgers and Co.* 1 Bell, 391, note 4. In that case, a banker who held a bill, which was a renewal of a bill for a previous debt, converted the words "payable on demand" into "one day after date," to make it bear interest. The Court of Session decreed for the original debt, with interest; but the House of Lords, as the action related only to the last bill, found that it was null, reserving to the pursuer his action for the first bill. In a recent case, *Hamilton v. Kinnear and Sons*, 17th June 1825, 4 S. and D. 102, where the year of payment, being 1825, was reported by a banker and engraver to have been vitiated, the Court of Session passed a suspension by the acceptor, without caution or consignation. In an English case, *Long v. Moor*, cited 3 Esp. 155, note, where the word "date" had been substituted in a bill for "sight," so as to make it payable after date instead of after sight, the acceptor, in an action against him by an indorsee, was held to be discharged; and Lord Kenyon refused even to sustain action against him on the money counts, in respect that he was not liable to the plaintiff at all, unless by force of the instrument. A similar decision was given in *Anderson v. Langdale*, 3 B. and Ad. 660. But the contrary was decided in an action by the drawer against the acceptor, it being held that the former might resort to the original consideration; *Atkinson v. Hawdon*, 2 Ad. and Ell. 628.

² *Sutton v. Toomer*, 7 B. and Cr. 416; 1 M. and Ryl. 125.

³ In *Callender v. Kirkpatrick and others*, 10th Dec. 1812, F. C., the Court of Session dismissed an action on an accommodation-bill, in which the name of one of two drawers, (who was likewise an indorser,) had been deleted by the mistake of a subsequent indorser, it being argued that this changed the obligation, inasmuch as the remaining drawer lost his recourse against the other, while, if he likewise was liberated on that ground, it was an injury to the other indorsers. It was held to make no difference that this was an accommodation-bill. In *Fleming v. Leiper and Scott*, 1st July 1823, 2 S. and D. 446, the drawer of an accepted bill, (agent for a bank,) after it came back to him by re-indorsation, having deleted his own name and substituted that of another person who also signed as drawer, the Court held the document to be null both at common law and by the stamp acts, as it was a new agreement, and required a new stamp. Afterwards it was decided, that the same bill, thus altered, could not form the ground even of an action by the bank against the acceptors; *Young and Trustees v. Paisley Bank*, 10th March 1831, 9 S. and D. 374.

⁴ In *Macara v. Watson*, 3d June 1823, 2 S. and D. 360, F. C., the Court refused to sustain even as a libel, a charge on a bill where the first indorsee's name had been altered from William to Thomas, seeing the charger would thereby have got the benefit of caution, reserving, however, all claims in a new action.

⁵ *M'Ewen v. Graham*, 21st Nov. 1833, 12 S. D. B. 110.

⁶ In *Knill v. Williams*, 10 East. 431, the plaintiff was non-suited in an action on a promissory-note, which at first bore generally to be "for value received," but to which was added afterwards, "for the good will of the lease and trade of

tioned in the acceptance, so as to substitute a solvent for an insolvent house¹, or to authorise the holder to protest the bill or note for non-payment, after presenting it at the substituted place, of which the acceptor knew nothing², or by adding a

"Mr F. Knill, deceased," this being held to be a new agreement, which required a new stamp.

¹ In *Tidmarsh v. Grover*, 1 M. and S. 735, a bill being accepted payable at Bloxam and Co.'s, who failed, and the drawer having thereupon substituted Eisdale and Co.'s, the bill was held to be null on that ground, in an action by an indorsee against the acceptor. In the case of the *King v. Treble*, 2 Taunt. 329, it was decided by the Twelve Judges, that an alteration made, (under circumstances similar to those of the preceding case,) in the place of payment of a note, amounted to forgery.

² *Cowie v. Halsall*, 4 B. and A. 197. Such was the ground of decision in this case, where a bill was held to be void, in an action by the indorsee against the acceptor, in respect that, after being accepted generally, some person had added these words to the acceptance, "Payable at Mr Bullock's, 38. Chiswell Street." It was held, (the case being tried before the 1 and 2 Geo. IV. c. 78, limiting the effect of such an addition,) that the acceptor was thus exposed to the risk of having measures adopted against him for non-payment, immediately after the presentment of the bill at this place, though he had no means of knowing that it would be presented there. The same circumstance was likewise stated as one ground of judgment in the case of *Tidmarsh v. Grover*, note 1. Such an argument would be peculiarly applicable in Scotland, in as much as the measures against the acceptor would be much more summary, in the event of non-payment, than in England. *Vide* also *Macintosh v. Haydon*, 1 Ry. and M. 362, *per* Abbott, C. J. The alteration in that case consisted in a note subjoined to the acceptance by the drawer and payee, without the acceptor's knowledge. It was held that, although, since the 1 and 2 G. IV. c. 78, (*post*,) this might not be a material alteration with reference to the acceptor, it was material in a question of recourse between an indorsee and indorser, if such had occurred, since, from the addition, it would appear that the acceptor had made default, if he did not pay at the place therein specified, and thus there would be room for a claim of recourse, although, in fact, there was no default, as the acceptor was not aware of such an addition, or of the consequent necessity to pay at the specified place. *Vide* also *Sparks v. Spur*, Chitty, 204, note *h*. An alteration in a mere memorandum of the place of payment, when made by the acceptor, at the holder's desire, was held not to be material, the acceptance not being a qualified acceptance, under the 1 and 2 Geo. IV. c. 78; *Walter v. Cubley*, 2 Cr. and M. 151; 4 Tyrhw. 87. But, when the alteration was made after acceptance, and in a different handwriting from the acceptor's, the indorsee suing on the bill was held bound to prove that the alteration had been made with the acceptor's consent; *Darbrow v. Weatherly*, 6 C. and Pay. 756; *vide* also *Taylor v. Mosely*, 6 C. and Pay. 273. A similar alteration was pleaded unsuccessfully by the drawer and indorser, in the case of *Beattie v. Haliburton*, 18th Feb. 1823, F. C., where the place of payment being *Leith* Banking Company's Office, Dalkeith, the word *Leith* had been evidently altered. The Court of Session held, though by the narrowest majority, that the alteration

new obligant to a note after it has been signed by the other obligant, and put into the payee's hands¹. An immaterial alteration will not vitiate a bill or note². The mere insertion of a memorandum, mentioning where the money may be found when due, if not made part of the acceptance, will not vitiate a bill³, nor the addition of the words "or order," to a bill made payable to bearer, since such a bill is held to be one payable to order⁴, or, according to another report, the inser-

was not material, as there were only two banking offices in Dalkeith, and it had not been shewn that the other office had been originally inserted, and farther, as the drawer had not proved damage from the alteration. But, 1st, Such an alteration in the place of payment was material, since, this place being inserted in the body of the bill, formed a qualification of the obligation; 2dly, This part of the obligation was so altered, that it became impossible to say what it had been originally, and the only thing certain was, that it had been different from what it was now; and, 3dly, There being thus a new obligation, it made no difference that damage could not be proved, since the mere insertion of a new obligation nullified the bill, both at common law and under the stamp laws. One of the Judges conjectured that it might have arisen from a blunder of the writer, but there was no evidence of this fact.

¹ Clark v. Blackstock, Holt, 474. In this case, Bayley, J. held, that such an addition (made without a new stamp) vitiated a note, unless the original agreement had been that there should be two obligants, in which case he thought that the additional signature was good. This last point, however, seems to have been differently viewed in Scotland, in *Macara v. Watson*, 3d June 1823, 2 S. and D. 360, where the Court held, that it was no objection, even against summary diligence on a bill, that a new acceptor had been added to the address of the bill, and had accepted it without the drawer's knowledge, after delivery of it to the other acceptor, for whose accommodation it was drawn. Such a material change in the obligation, even though the drawer's consent had not been necessary, does not seem to have been admissible without a new stamp. The same remark is applicable to the decision in *M'Dougall v. Foyer*, 75, note 4. In a late case, *White ex parte*, 2 D. and Ch. 334, it was held that a new stamp was not required, if the additional signature was made before money was advanced on the note, or if the party had promised to sign before the advance, though she did not sign till afterwards.

² *Sanderson v. Symonds*, 1 Br. and Bingh. 426.

³ In *Marson v. Petit*, 1 Campb. 81, note, where, after acceptance of a bill, the drawer had added the words "*Prescott and Co.*," Lord Ellenborough held, that this addition did not vitiate the bill, as it did not alter the acceptor's responsibility, although he said that it would have vitiated the bill, if that had been its effect. The same principle probably ruled the decision in *Trapp v. Spearman*, 3 Esp. 57, where Lord Kenyon decided, that a bill was not vitiated by adding these words, after acceptance, "when due, at the Cross-Keys, Blackfriars' Road;" at least Lord Ellenborough afterwards held, in *Tidmarsh v. Grover*, that this decision could not be defended on any other ground, than that these words were intended merely as a memorandum where to find the money.

⁴ *Attwood v. Griffin*, 2 C. and P. 368, where such an alteration was not held to nullify the bill, either at common law, or under the stamp laws.

tion of a special payee's name in a bill made payable to or order¹, or the scoring out of the words "& Coy," from the address of the bill, which was originally to Messrs Southey, Crowther & Coy²; nor will it be vitiated by the addition of the words "conjunctly and severally³," seeing it is settled that each acceptor is bound for the full amount, whether these words be inserted in the bill or not. In England, where these words are necessary to render each acceptor liable for the full amount of the bill, such an alteration has been held to vitiate a note⁴, not being sanctioned by one of the parties who had signed it, when only a joint note, and was not a party to the alteration. No question was raised under the stamp laws, as it had not been delivered before it was altered. The plaintiff however gave up his action on it, and resorted to the money counts, in which he also failed.

As the word "cautioner" has been admitted into bills and notes, to the effect of regulating the relief of obligants *inter se*, an erasure or alteration in that word, as added to the name of any obligant, would probably vitiate the bill or note⁵.

It has been decided⁶, that the deletion of two receipts for partial payments, which were written on the back of a bill, forms no defence against an action on the bill for the balance admitted to be due. If the receipts have been inserted by mistake, and deleted afterwards, an action would probably be sustained on the bill for its full amount.

The correction of a mistake in a bill or note⁷, so as to ren-

¹ 1 Ry. and M. 425.

² Farquhar v. Southey, 1 M. and Malk. 17; *vide* to the same effect the Scotch case of Dougal, 8th Feb. 1828, 6 S. and D. 504.

³ Gordon v. Sutherland, 20th Jan. 1761, Morr. 14677.

⁴ Perring v. Hone, 2 C. and Pay. 401; 4 Bingh. 32.

⁵ A decision to this effect was given by the Second Division of the Court, in a case, Robertson v. Annan, 27th May 1825, 4 S. and D. 40, and F. C., where the question was with the indorsee of a bill, who had taken it after the word "cautioner," added to the name of the defender, one of two acceptors, who signed for the accommodation of the other, was said to have been erased, and "conjunctly and severally" substituted for it. The case involved several points.

⁶ Lowe v. Campbell, 10th Dec. 1825, 4 S. and D. 299.

⁷ This has been decided in various English cases. In Kershaw v. Cox, 3 Esp. 246, it was held, first by Le Blanc, J., and then by the Court of King's Bench, that the addition of the words "or order," made to a bill after acceptance, did not vitiate it, as it was conformable with the original intention of

der it what both parties originally intended it to have been, will not vitiate it. But it must be proved that the alteration was so made¹.

2. Effect of the stamp laws on alterations.

The alterations last mentioned do not require a new stamp ; but if a bill or note has been completed and issued, it cannot be altered, even with consent of all parties, without a new stamp, because the bill or note thus altered forms a new agreement².

parties. This decision was sanctioned in *Bathe v. Taylor*, 15 East. 412. In Scotland, this alteration would, besides, have been accounted immaterial, as all bills and notes are indorsable here, whether they bear the words, "to order," or not. In *Jacobs v. Hart*, 6 M. and S. 1423, an alteration of the date of a bill, from 3d March to 3d April, made after acceptance, but by the acceptor's desire, and agreeably to the original intention of parties, was held not to vitiate it. In this case there was another alteration as to the plan of payment by the acceptor, which was held not material. But *vide Rowe v. Young*, 2 Br. and B. 165, and 1 and 2 G. IV. c. 7-8, § 1; also *Stevens v. Lloyd*, 1 M. and Malk. 292; *M'Intosh v. Haydon*, 1 R. and M. 262, and other cases, 182, note 2. In *Webber v. Maddocks*, 3 Camp. 1, Lord Ellenborough sustained action by the indorsee against the acceptor of a bill, which had been altered from a note to a bill, after being subscribed as a note, the alteration having been made conformably with the original agreement of parties. In *Brett v. Picard*, 1 Ry. and M. 37, an alteration in the date of a bill, from 1822 to 1823, made after it had been drawn and accepted, and given to the drawer's agent to deliver to the indorsee, was allowed on the ground of its being made to correct a mistake. In Scotland, the same doctrine was held, and the bills in question sustained, in *Henderson v. Hay*, 20th Feb. 1802, *Morr. App. v. Bill*, 16, where, in a bill dated 7th Oct. 1799, but in which the term of payment was made Martinmas 1780, it was afterwards, in order to correct this obvious mistake, altered to Martinmas 1800; in *Mill v. Russell*, 16th Jan. 1810, F. C., where an indorsee who was about to do diligence on an accepted bill, wrote his name, through ignorance, on the face of it, immediately above the drawer's name, but afterwards deleted it on being informed of his mistake. A contrary doctrine to that of the preceding cases was followed in *Bryce v. Ranaldson Dickson*, 16th Nov. 1810, F. C., where action against an acceptor of a bill was refused, on the ground that the term of payment had been altered from Lammas to Candlemas, although the alteration was in the acceptor's favour by postponing the term of payment six months, and though proof was offered that it had been made by the other acceptor to correct a mistake. But the soundness of this decision has been questioned, 1 Bell, 392.

¹ *Henman v. Dickenson*, 3 Bingh. 183; 2 M. and Pay. 289.

² This has been settled by a number of decisions. In *Wilson v. Justice*, 1796, Bayley, 110, note 1, where a bill drawn originally at nine months' date, had, a fortnight after its delivery to the payee, been altered to ten months' date with consent of all parties, Lord Kenyon non-suited the plaintiff, on the ground that a new stamp was necessary. In *Bowman v. Nicholl*, 5 T. R. 547, where the objection turned ultimately on this fact, that a bill payable to the drawer

The act 1 Ann. c. 2, sect. 2 and 3, enacts certain penalties against those who use a stamp which has been already filled up with a contract or writing in respect of which stamp-duty is payable, by a new writing of the same kind, and the 12 Ann. sess. 2, c. 9, sect. 21 and 24, enacts, that each separate matter requiring a stamp must pay a separate duty; and though the words of these enactments restrict them to the duties therein mentioned, yet their principle seems to be universally applicable. The authority of the last enactment has been accordingly recognised in Scotland¹, though the case was held not to fall under it. According to this rule, it is unlawful, after using a bill stamp for one obligation, to make it applicable, by a material alteration of the terms of the bill, to a new obligation, and the instrument thus altered becomes null. But it has been decided², that an alteration in a note as to the rate of interest, from 3 *per cent.* to 2½ *per cent.*, made with consent of both parties, though it voided the instrument, did not prevent it from being given in evidence of the original loan. An alteration as to the place of payment annexed to the acceptance of a bill, made with the acceptor's consent, after it was in the drawer's hands, has been held not to nullify

twenty-one days after date, had, after it became due, but while it was in the drawer's hands, been altered in the date from 2d to 14th September, though with the acceptor's consent, and had been then negotiated, Lord Kenyon non-suited the plaintiff, (an indorsee,) on the same ground as in the preceding case, and the non-suit was confirmed by the Court. In *Cardwell v. Martin*, 187, note 2, and *Bathe v. Taylor*, 187, note 2, in which cases the bills were held to have been issued before the alterations were made, the plaintiffs were non-suited, on the ground that new stamps were necessary. A similar decision was given, under the like circumstances, in *Walton v. Hastings*, 187, note 3, where an alteration in the date of a bill had been made after it was completed and issued. In *Knill v. Williams*, 10 East. 431, being an action by the payee against the maker of a note, the plaintiff was non-suited, and the non-suit confirmed by the Court of K. B., on the ground, that after the note had been delivered to the plaintiff, a specific consideration had been substituted in the note for the general words, "value received;" it being held, (though both parties had consented to the alteration,) that this was a new agreement, and required a new stamp; *vide* also *Taylor v. Mosely*, 6 C. and Pay. 273. The same rule was held lately in Scotland, in the case of *M'Lean v. Morrison*, 26th May 1834, 12 S. and D. 613, where a bill altered in the sum after being issued, was found to be null in an action against the acceptors.

¹ *Johnston and Co. v. Atwell*, 7th March 1801, *Morr. Writ. App. No. 5*.

² *Sutton v. Toomer*, 7 B. and Cr. 416; 1 M. and Ryl. 125.

it¹. The correction of a mistake is different from this case, because the object of it is to give effect to the original agreement.

As to the time of issuing, 1st, A bill or note is issued so soon as it is in the hands of a person entitled to enforce payment, whether it has been given in exchange for a cross acceptance², or for any other value, whether the payee and holder is the drawer³, or third party⁴. But, 2^{dly}, It cannot be held as issued unless it is in the hands of the payee, or other holder, when drawn in favour of a third party, or, if it is made payable to the drawer, unless it has been accepted⁵ or

¹ *Stevens v. Lloyd*, 1 M. and Malk. 292.

² In *Cardwell v. Martin*, 1 Camp. 79, 9 East. 190, an alteration in the date of a bill from 3d to 23d June, to the effect of postponing the term of payment twenty days, made while it was still in the hands of the drawer, (who was likewise payee,) by consent of him and the acceptor, but after the drawer had got the bill in exchange for a cross-acceptance by him to the drawee, was held by Lord Ellenborough, and afterwards by the Court of K. B., to vitiate the bill, even in an action by an onerous indorsee, in respect that the bill was completely issued, the drawer having purchased it before the alteration by his cross-acceptance, and having been thus *in titulo* to indorse it to any third party.

³ *Vide Cardwell v. Martin*, note 1. In *Bathe v. Taylor*, 15 East. 412, the Court of King's Bench decided, that a bill made payable to the drawer must be considered as issued so soon as it was returned to him accepted, and that, therefore, an alteration of the date, from 1st to 21st August, (which postponed the term of payment twenty days,) though made by the drawer with the acceptor's consent, vitiated the bill for want of a new stamp. The same doctrine was held by Lord Ellenborough in *Calvert v. Roberts*, 3 Camp. 343, where the plaintiff was non-suited in an action by the indorsee of a bill which had been accepted for the drawer's accommodation, and was thereafter altered by him from 10th to 16th March, before he indorsed it away to the plaintiff. No weight was given to the plea, that an accommodation bill, payable to the drawer's order, is not an effectual agreement till it is indorsed.

⁴ In *Walton v. Hastings*, 4 Camp. 223, 1 Stark. 215, which was an action by the payee of a bill drawn by a third party, against the acceptor, Lord Ellenborough held at N. P., that an alteration of the date from 5th to 20th July, made by the plaintiff on presenting it for acceptance, though by desire of the defendant, who thereafter accepted it, rendered it null, in respect that it thus became a new agreement, which ought to have had a new stamp.

⁵ This principle supports the decision in *Laidlaw v. Park*, 3d August 1774, *Morr.* 16941, where action was sustained against the acceptor's representative, on a bill payable to the drawer, although the acceptor had altered the sum before acceptance from £.60 to £.50, chusing to pay the difference of £.10, which consisted of interest. The interlocutor bears to have been pronounced chiefly on the ground that the acceptor himself made the alteration. But this would not have been sufficient, consistently with the stamp laws, if he had made the alteration after acceptance. In *Fairweather v. Alison*, 12th Feb. 1817, F. C., action

indorsed by the drawer¹, there being no concluded agreement in this last case which can confer a right of action, unless through the acceptance, which gives an action against the drawee, or through an indorsation by the drawer, which gives the indorsee an action against him, though the bill should not

was sustained against the acceptor's representative on a bill payable to the drawer, although the acceptor had, *at the time of acceptance*, altered the date from 19th to 29th May, so as to postpone the term of payment ten days. Again, in *Sutherland v. Morrison*, July 1823, 2 S. and D. 442, which was the suspension of a charge on a bill payable to the drawer, it was found, that an alteration of the date from 14th to 24th January, made before acceptance, at the drawee's request, was not even an objection to summary diligence. The same doctrine has been held in England, in *Kennerley v. Nash*, 1 Stark. 452, where, in an action by an indorsee of a bill payable to the drawer against the acceptor, Lord Ellenborough considered it to be no objection that the term of payment had been altered before acceptance, at the drawee's request, from three to four months, being of opinion that no new stamp was necessary. In *Peacock v. Murrel*, 2 Stark. 558, which was an action by the indorsee against the acceptor of a bill, that appears to have been likewise payable to the drawer, an alteration in the date from 4th to 14th January, made before acceptance for the drawer's accommodation, was held to be no ground of objection; and, in a question, whether the bill was liable to stamp-duty as a bill drawn at two months' date, or at a longer date, it was decided, that the term of payment must be calculated from the date appearing on the face of the bill. A similar decision was given more recently by the Court of King's Bench in *Upstone v. Marchant*, 2 B. and Cr. 10, 3 D. and R. 198, where a bill made payable to the drawer's order in two months from its date, and dated at first on 21st December, in which state the drawee accepted and delivered it to the drawer, having been altered in its date at the acceptor's request, after it was a few minutes in the drawer's possession, to 31st December, it was found to be still liable only to 2s., as the duty applicable to a bill payable within two months, not to 2s. 6d., as a bill payable in more than two months from its date, the altered date, appearing *ex facie* of the bill, being still held to be the true date. The bill could not be held, in this case, as issued, till it was accepted; and the alteration of date was justly held to be valid, as being made *simul et semel* with the acceptance. This was also held in *Johnson v. Garnett*, 2 Chitty's R. 122, where a bill was altered by the acceptor's agent in the date, from 8th to 28th June, before it was delivered to the drawer and payee. The same doctrine was held in *Johnson v. Gibb*, id. 123, though the circumstances of the case were held to be different; and also in *Sherrington v. Jermyn*, 3 C. and Pay. 374, and in *Leykarriff v. Ashford*, 12 Moore, 281, where the acceptor had marked the altered date of payment, along with his acceptance, and, as was presumed, at the term of acceptance.

¹ In *Outhwaite v. Luntly*, 4 Camp. 179, where the drawee of a bill made payable to the drawer had altered the date from 5th to 15th March, before acceptance, but after the drawer had indorsed it, Lord Ellenborough held the bill to be vitiated, not only because the drawer had not consented to the alteration, but because the bill could not be altered after negotiation consistently with the stamp laws.

be accepted. *3dly*, It has been decided in England¹, that an accommodation bill, which, though both accepted and indorsed, was not issued, but deposited in the hands of an agent for behoof of all the parties, was not complete till it had been given to a third party, and that therefore an alteration in the date, from 6th to 16th March, made before that time with the acceptor's consent, did not vitiate it as to him. It was held, in this case, that, though the bill as altered was not binding on the parties when made without their consent, the acceptor was bound by it, as he assented to the alteration after it was made. But it does not appear that such assent would validate the bill, even against the party assenting, if the alteration should be made after the bill has been issued, because the bill would then be null for want of a new stamp². *4thly*, It remains with the party claiming on a bill or note to prove that the alteration was made before it was issued. For instance, in the foregoing case, the holder was obliged to prove that the alteration

¹ *Downes v. Richardson*, 1 D. and R. 332 ; 5 B. and A. 674. It is not easy to distinguish between this case and that of *Calvert v. Roberts*, 187, note 2, and if they should be considered as the same, the latter, being only a *Nisi Prius* decision, must be held as overruled. There is, indeed, one distinction, viz. that, in the latter case, before the alteration, the drawer, who was creditor at least *ex facie* of the bill, had the full disposal of it ; whereas, in the other case, the bill, instead of being issued even to the drawer as creditor *prima facie*, was deposited with an agent for behoof of all concerned. But the Court of King's Bench, in giving their opinions in *Downes v. Richardson*, lay it down that an accommodation-bill cannot be considered as issued till it is in the hands of an onerous holder. The same doctrine was lately recognised in a case decided by the First Division of the Court of Session, *M'Kenzie v. The British Linen Company*, 29th Nov. 1825, F. C. ; *vide* also Lord Moncreiff's observations on this point in a note to the case of *Mackay and Co. v. Robertson*, 11th July 1832, 10 S. and D. 813, and the rules of law laid down by him afterwards in the same case, 21st May 1835, 13 S. D. B. 813. The proof in this case, that the bill was an accommodation bill, and that the payee, who was said to have been accommodated, had assented to the alteration, before the bill had been issued to a third party, failed.

² In *Paton v. Winter*, 1 Taunt. 420, where, after a bill made payable to the drawer had been indorsed by him to a third party, and presented for acceptance, the drawee altered the term of payment from one month to two months, and then accepted it, the Court of C. P. appear to have held, that though the drawer might be discharged, the acceptor was bound by his acceptance. But it was observed by Lord Ellenborough in *Walton v. Hastings*, 187, note 3, that the objection to this doctrine founded on the stamp-laws was not stated ; and his Lordship farther says, that the case is not worth reporting. If the objection had been stated, the bill would have probably been held altogether null.

had been made before the bill was indorsed to a third party¹; and in another case², although the alteration was in the handwriting of the acceptor, against whom the action was brought, and immediately above his signature, the plaintiff, an indorsee, was held bound to prove that it had been made before the bill was indorsed. In the same case, however, it was held to be *prima facie* evidence of this fact, that the bill was in the drawer's possession after acceptance.

¹ *V. Bayley*, 95, notes 15 and 16, and *Henman v. Dickenson*, 3 Bingh. 184.

² *Johnson v. The Duke of Marlborough*, 2 Starkie, 313. A decision was pronounced on the same principle, in *Bishop v. Chambre*, 3 C. and Pay. 55.

SECTION V.

Peculiarities of Checks on Bankers, Bankers' Notes and Bank-Notes.

These documents resemble bills and notes, except in those points which are now to be noticed as peculiar to each of them respectively.

1. A banker's check or draft is a written order addressed to a banker by a person who has money in his hands, requesting him to pay a sum out of it to a party therein named, or more generally to the bearer. It is exempted from stamp-duties; but the stamp acts enforce certain requisites¹, as conditions of the exemption, which must be strictly observed. An unstamped check in which they are not observed is null²; but, if it is stamped as a bill, it will be valid. At common law it is subject to nearly the same rules as a bill of exchange, excepting, *1st*, That it is payable only on demand; *2dly*, That the banker on whom it is drawn does not accept by subscribing his name, but pays the draft when it is presented³; and, *3dly*, That there appears to be some doubt whether, on non-payment of a draft, summary diligence is competent upon it against the drawer, as on a bill of exchange⁴, or whether it could be

¹ *Ante*, 31.

² *Borradaile v. Middleton*, 2 Campb. 53.

³ It has been found that a banker must pay a check within a reasonable time after he has got sufficient funds; viz. within such a time as enables the clerks in his establishment to ascertain from his accounts and books that he has got them, and it being left to the jury to say whether from 11 o'clock, when money was paid in, to 3 o'clock the same day, when the check was presented, was sufficient time for that purpose, they found that it was, by a verdict for the plaintiff; *Margetti v. Williams*, 1 B. and Ad. 415.

⁴ The competency of summary diligence in such a case was disputed in *M'Gilchrist v. M'Arthur*, 16th Jan. 1794, Morr. 877. But the Court avoided the decision of the question, by converting the charge into a libel. The act 1696, c. 36, which extends the act 1681, regarding foreign bills to "inland" bills and *precepts*, might, perhaps, be held to include bankers' checks under the word "*precepts*." But the two acts, when taken together, do not appear to have contemplated the case of checks, since the act 1681, as extended by the act 1696, authorises a protest against the drawer, as the foundation of diligence, only in the event of *non-acceptance*, while, in the case of a draft, no acceptance

even protested against the drawer. But recourse would be competent on it in an ordinary action¹. It is likewise transmissible by indorsation, or, if made payable to the bearer, by delivery². The effect of taking checks in payment or to account of a debt depends on the same principles which have been already explained, with regard to bills or notes³; and the rules for negotiating checks, which are nearly the same with those applicable to bills or notes, shall be afterwards discussed with reference to all these documents.

2. Bankers' notes, payable to the bearer on demand, are similar, at common law, to other promissory-notes of that class, in form, in the mode of transmission, and in the remedies competent on them. There are special statutes, to be afterwards noticed⁴, which regulate the summary execution on such notes. But the law, as already explained with regard to promissory-notes, applies in general to them. In England, it appears from the older decisions⁵ to have been the practice for goldsmiths, who then acted as bankers, to give notes to their customers for the sums deposited with them, payable to the bearer on demand; and these were transferred in payment of debts like other promissory-notes. The statute of Anne, already mentioned⁶, placed these, and all other promissory-notes, on the same footing with bills of exchange. They do not appear to have been much used in Scotland, where it is more customary for bankers to give receipts for the money deposited with them, which are payable on demand, and bear interest, at least in Scotland, whether

is required, so that there could be no warrant, under these acts, for protesting a draft against the drawer, and, consequently, there could be no foundation for summary diligence.

¹ In *M'Gilchrist v. M'Arthur*, 191, note 4, where the holder of a bank check, instead of presenting it, paid it away to a third party, who did not present it till ten days after its date, the Court, notwithstanding, held both the drawer and the trustee for his creditors liable to recourse, in respect of his having withdrawn his funds from the bank before the draft was presented. It was held that the act 1696, c. 25, against blank writs, did not apply to it, as it fell under the exemption in favour of the "notes of trading companies."

² *M'Gilchrist v. M'Arthur*, 191, note 4.

³ *Ante*, 162, *et seq.*

⁴ Chapter VII. on Action and Diligence.

⁵ *V. Nicholson v. Sedgwick*, 1 Lord Raym. 180.

⁶ *Ante*, 4.

stipulated or not. If they stipulate it, whether *in gremio* or in a memorandum, they are subjected to stamp-duty as promissory-notes¹. This provision indicates the opinion of the Legislature, that the stipulation of interest after the term of payment is not inconsistent with the nature of notes or bills. These receipts, like bills or notes, are transmissible by indorsation². But money deposited with bankers, whether on deposit receipts or on a current-account, is generally made available by checks or drafts to account.

The most common bankers' notes are notes, likewise payable to the bearer on demand, which circulate as cash, so long as the bank issuing them is in good credit, the holder being always entitled to demand cash from the bank for their amount. The duties imposed by the stamp acts on bankers issuing such notes, and the regulations under which they may be issued, have been already explained³. These notes, when issued by the Bank of England and the Bank of Scotland⁴, are styled bank-notes, and have peculiar privileges by statute.

By the act 37 Geo. III. c. 45, which was continued from time to time by other successive acts, but was at last repealed by 59 Geo. III. c. 49, the Governor and Company of the Bank of England were restrained from paying any of their notes in *specie*, and authority was granted to stay legal proceedings brought against them to enforce such payment; and it was also provided, that payments in such notes should be deemed payments in cash, *if received as such*. The same act authorised collectors of taxes to receive Bank of England notes in payment; and it farther provided against arresting a debtor to hold him to bail, unless on affidavit that he had not tendered payment of his debt in Bank of England

¹ 55 Geo. III. c. 184, Schedule, part 1.

² This was held by the Court of Session (2d Division) in an unreported case, *Lindsay v. Robertson*, 1815, where a bank receipt having been indorsed by a mark before two subscribing witnesses, the Court allowed the witnesses to be examined before answer, as to the genuineness of the indorsation. Session papers in my possession.

³ *Antea*, 41-2.

⁴ *Vide* case of *Gray*, 1 Hume, Comm. 145, note 1, where the Court of Justiciary held, *inter alia*, that the word "bank-notes," in a penal statute, included notes issued by the Bank of Scotland, as well as notes issued by the Bank of England.

notes. But this act did not make such notes a legal tender. The Court of Common Pleas so decided ¹, by finding that it was not a legal payment by a country bank for a £.5 note which they had issued, to give a Bank of England note for it instead of money. The same point was maintained in two trials ², under certain English statutes, for exchanging guineas for Bank of England notes, at a higher rate than their legal value; it being pleaded, *inter alia*, in an argument on a special verdict, that the act charged did not fall under the statutes, inasmuch as these statutes related only to the taking of *money* for coin, &c. and not to the taking of bank-notes. Judgment on the verdict was finally arrested, in conformity with the opinion of the Twelve Judges. It does not appear with certainty on which of the grounds pleaded their judgment was founded. But the plea now stated probably formed one ground; since, by an act which passed immediately afterwards ³, taking or giving bank-notes for coin, at a higher rate than the legal value of the coin, was declared to be a crime, as much as receiving or paying money had been before. This statute likewise enacted, that no person should be entitled to levy a debt by distress or pouding, if the debtor had tendered payment in Bank of England notes. But these notes were never declared by law to be a legal tender, which the creditor *must receive as money*, (though he was prevented from enforcing payment otherwise if they were tendered); and since the 37 Geo. III. c. 45, and all the other acts following on it have been repealed, such notes are not to be considered as money, unless received as such. Other notes of the same kind, issued by private banks, though these banks have not the same privileges, will be considered as money, when given in payment, unless the creditor declines to receive them as such ⁴. The description which Lord Mansfield has given

¹ Grigby v. Oakes and another, 2 Bos. and Pull. 526.

² The King v. Wright, and The King v. De Yonge. Vide Trial, 1810.

³ 51 Geo. III. c. 127.

⁴ Richard v. Bankes, 13 East. 20. This principle was recognised, first by Chambre, J., and afterwards by the whole Court of King's Bench, in an action brought by a person who had gained a wager of ten guineas, against the stakeholder, for the money, which the stakeholder had paid away to the other party. The defence was, that the stakeholder had received only notes of the Hull Bank, which were not money. But it was held, that since he had received them as

of bank-notes¹ applies, on this point, to the notes of all private banks. But a person who has found such notes will not be liable for their value, unless he has got money for them²; although this fact will probably be presumed, unless he produces them, as was found in an action for the value of certain masquerade tickets, where the defendant failed to produce the tickets, or to account for them³.

By the 5 Geo. III. c. 49, § 1, 2, 3, which is peculiar to Scotland, such notes cannot be issued for the purpose of being circulated as specie, unless when made payable to the bearer on demand, excepting, however, post bills payable seven days after sight, which are allowed to be issued as they were then issued by the Bank of England. The same act, § 7, prohibits the issuing of bankers' notes for any sum less than twenty shillings. This regulation has been since repeatedly repealed and renewed. At present it is in force⁴.

If a creditor receiving bank-notes, or bankers' notes in payment, wishes his debtor to be responsible for their amount, in case he does not obtain cash for them, he should require him to indorse them. By indorsation, he will become liable, not only to the indorsee, but to any other person to whom the note may be transferred, if it be presented for payment without undue delay, and is not paid. The degree of diligence in negotiating such notes, necessary to preserve recourse, shall be

money, they were to be so considered as to him; and the verdict against him was confirmed by the Court.

¹ In *Miller v. Race*, 1 Burr. 457. *Vide* also in Scotland, *Crawford v. New Bank*, 24 Feb. 1749, Rem. Dec. 105. As to the rule that bank-notes are to be considered in common language as cash, *vide* *Wright v. Read*, 3 T. R. 554, and *Cousins v. Thomson*, 6 T. R. 335, in both which cases bank-notes were held equivalent to cash under the Annuity Act, 17 Geo. III. c. 26; as also *Knight v. Riddle*, 9 East. 48, where it was decided that bank-notes, as being equivalent to cash, could not be taken in execution. *Vide* also *Francis v. Nash*, 2 Barnard, 205. It was argued, but not decided in Scotland, whether bank-notes can be poinded, in *Alexander v. M'Lay*, Summer Session 1825. In *Black v. Smith, Peake* 88, Lord Kenyon, C. J., held, that the offer of a bank-note, with a request for change, was good as a tender of payment of a sum less than its amount, if not objected to at the time, and in *Todman v. Lubbock*, 1824, 1 C. and P. 365, note, the same thing was held regarding a similar offer of two sovereigns in payment.

² *Noyes v. Price, Chitty*, 556, note a.

³ *Longchamp v. Kenny*, 1 Dougl. 138.

⁴ *Ante*, 31.

afterwards considered. To ascertain whether the note has been presented for payment in due time after it was transferred, the indorsement should be dated. But even without indorsement, the person paying away the notes will be liable for their amount, when duly negotiated, if the fact of their not being taken as cash be ascertained by other written evidence; for instance, by their being specified in the receipt granted for the debt, or in a writing under the debtor's own hand.

The kind of title which is sufficient to defend the holder of such notes as these against the claim of a person from whom they have been lost or stolen, shall be afterwards discussed in considering the transfer of bills and notes.

CHAPTER II.

WHO MAY BE PARTIES TO BILLS OR NOTES, AND IN WHAT MANNER THEY MAY BECOME BOUND?

THE subject of the present Chapter shall be considered with special reference to bills and notes, though it will be necessary to explain, with regard to it, certain general principles applicable also to other obligations. The questions to be discussed are :

- I. Who may be parties to bills or notes ? and,
- II. In what manner, or under what characters they may become bound ?

SECTION I.

Who may be Parties to Bills or Notes?

1. Consent being essential to bills and notes, no person can be a party to them, if his signature is extorted¹. On this principle, persons destitute of reason, and pupils, cannot be bound, even to an onerous indorsee.

2. There are also certain rules for the benefit of persons, who, though not incapable of consent, are yet unable to protect their own interests.

Minors.—Minors, (*viz.* males from fourteen, and females from twelve to twenty-one years,) being presumed capable of consent, their obligations are not in general null *ipso jure*. Such nullity applies only to deeds granted by a minor having curators, or living in family with his father, who is his administrator in law, without their consent²; and these deeds

¹ *Ante*, 102.

² *Erskine*, i. 7, 34. In *Bell v. Sutherland*, Jan. 1728, *Morr.* 8985, where a minor living in *familia* with his father, had, without his consent, attested a cautioner in a suspension, the obligation was found null. In *Campbell v. Lord Lovat*, 15th Jan. 1731, *Morr.* 9035, a bond granted by a minor, without his father's consent as his administrator, was found null, though he was then *majorennitatis proximus*, and had a commission in the army. In the case of *Waddel v. Gibson*, cited 199, note 1, two of the Judges appear to have held, that a minor's obligation was null without his father's consent, though the minor did not live in family with his father. But he was then only an apprentice. The case was decided on a different ground. But in the case of *Dundas v. Allan*, cited 201, note 1, where a bill was granted for a third person by a minor without his father's consent, he living apart from his father, and being engaged in business for himself as a writer, it does not appear to have been pleaded that the obligation was *ipso jure* null, although it was reduced on the ground of minority and lesion. The true principle seems to be, that in order to make a deed null without the father's consent, the son must either be living in family with his father, or be in such a situation as indicates that he is still under his control. In *Thomson v. Pagan*, 3d July 1781, *Morr.* 8985, a deed was found null which had been granted by a minor without consent of his curators. In *Anderson v. Cation*, 28th Nov. 1828, 7 S. and D. 78, a person who, when minor, without curators, and during his apprenticeship, but three days after his marriage, had signed two notes to his father's wife, but which accrued to his father as her husband, was held, on the ground

may be voided at any time, even after majority, without a reduction. But as this nullity is merely established for the minor's protection, it follows, that if neither he, nor any person for him, challenges the deed, no third person can do so. On the other hand, deeds by a minor who has no curators, or with consent of his curators, are valid till formally reduced; and a reduction cannot be brought after four years from the granter's majority, or where there is no lesion. Minority and lesion, therefore, are not, *per se*, grounds for suspending a charge on a bill, but can only warrant a reduction¹. In such a process, lesion will be presumed as to any bill or note by the minor, since it cannot be held that he has got value for it, unless that is proved; and, though he has granted the obligation for borrowed money, lesion will be presumed, unless the lender proves that the money was turned to his account². This right of reduction will, in general, be barred by any act of homologation after the party's majority, although³, where a young man had signed certain bills with his father when he was nineteen years old, and, fourteen days after majority, subscribed, with his father, a docketed account, of which the bills formed articles, certifying its accuracy, the Court held, that such a slight act of homologation, following so soon after majority, and arising from a feeling of duty to a father, could not bar reduction, and therefore sustained the reduction.

of his not being truly forisfamiliarized at the date of the notes, to be entitled to object to them as null, without a reduction, and was ultimately found not liable for them. Reference was made to *Crawford v. Bennet*, 19th June 1827, 1 Wilson and Sh. App. Cas. 608, where similar doctrine had been held by the House of Lords as to a receipt for money as advanced, granted by a minor without consent of his curators.

¹ *Waddel v. Gibson*, 18th Jan. 1812, F. C. Such was the decision in this case, where a minor suspended a charge on a bill, which he had subscribed conjunctly and severally with his father, when he was a boy of seventeen, and apprentice to a writer. It was pleaded, and two of the Judges held, that the bill was null, since the father, being his administrator, ought to have consented, but could not do so in this case, without being *auctor in rem suam*, as the bill was alleged, (though this was denied,) to have been granted for the father's benefit. But the majority of the Court appear to have held that this plea was not made out; and hence they decided, that minority and lesion alone could afford ground merely for reduction, not for suspension. *Vide Dick v. Cumming and Smiths*, 200, note 4.

² *Macdonald v. ———*, 16th July 1789, Morr. 9038.

³ *Melvil v. Arnot*, 5th July 1782, Morr. 8998.

The effect of a minor's right of restitution against obligations with regard to the parties contracting with him, cannot be discussed at length. But it has been too broadly laid down, even with regard to obligations by minors having curators¹, without their consent, that third parties remain bound, if their obligation is beneficial to the minor, though he should be free. By such a rule he would reap the benefit of an obligation, without taking its burdens. On the contrary², it seems equitable that, if matters are entire, the restitution should be complete on both sides³. The only modification of this doctrine in favour of the minor is, that he may demand restitution, though it should not be possible to make it completely to the other party, this being one of the risks attending a contract with a minor. But the other party, likewise, must be restored, so far as restitution is possible, agreeably to the maxim, *Nemo locupletari debet damno alieno*. Supposing even that the lesion could be redressed without setting aside the whole contract, it does not appear that a court could modify the contract to what might be accounted reasonable, instead of reducing it, since this would be to make a new contract different from that which the parties contemplated. These remarks, however, are thrown out only as hints for inquiry.

There are important exceptions to the doctrine of restitution. For instance, bills or notes, as well as other obligations, granted by a minor, whether with consent of his curators, (if he has any,) or not, are valid,

1. When the minor is in trade, as it will be presumed that he has granted them with reference to his trade⁴. But

¹ Erskine, i. 7, 33.

² Ibid. i. 7, 40.

³ Vide cases in Morr. 9022-3.

⁴ This was the ground for sustaining a minor's acceptance as a proof of funds in his hands, in a case, *Cowan v. Douglas*, cited by Forbes, 23. It was also the ground of decision in *Craig v. Grant*, 5th July 1732, Morr. 9035, where it was found relevant to sustain a bill granted by a minor without his father's consent, that he had been bred a wright, and was in business at the time of accepting it; it being held that the money must be presumed to be "advanced in *artis suae vel mercaturae exercitio*." A similar decision was given in *Grieve v. Tait*, 14th July 1732, Morr. 9056, where a minor, who was a merchant, was found liable in a bill granted by him for the price of goods which he had bought, though the goods were bought for a third party, for whom he was truly cautioner, this fact not being known to the seller. The same principle was recognised in

such a presumption will not hold when the bill is known to the creditor to be granted for a purpose not connected with the minor's trade; as where a minor, who is in business as a writer, accepts a bill as security for the price of goods sold to a third party¹. On the other hand, a bill, though granted under these circumstances, will probably be sustained in the hands of an onerous indorsee².

In England, bills granted by an infant are voidable, even though he is engaged in trade³.

2. As a minor, whether he has curators or not, may bind himself for necessary furnishings⁴, a bill or note granted by him for the price of such furnishings will be effectual. This

the more recent case of *Heddel v. Duncan*, 5th June 1810, F. C., where the Court, though by a narrow majority, found, that a young man of seventeen years of age, appointed substitute to the sheriff-clerk of a county, was liable to his principal for the money arising from a sale carried on under authority of the sheriff-court, which money he had allowed to get into the hands of the sheriff-substitute. In *Campbell and Curators v. Turner*, 24th Jan. 1822, 1 Shaw, 266, and Session Papers, certain bills obtained from a minor, who was facie, without consent of his curators, were sustained in the hands of an onerous indorsee, chiefly on the ground of his having been engaged in trade, with the exception of £.30 of one of the bills, for which it was held that the indorsee had not given value. In *Dick v. Cumming and Smiths*, 8th July 1824, 3 S. and D. 231, a suspension was passed without caution, in the case of a bill signed by a minor under a firm consisting of his father and himself. But the minor denied that he had carried on trade under this firm, and, though his father, with whom he still lived in family, had desired him to sign the firm, such a request could not be considered as a valid authority from the father, as his administrator, seeing it was interposed for his own behoof. This subscription, therefore, according to the minor's statement, appears to have been null, and consequently liable to suspension, reduction not being necessary to set it aside. In the case of *Macdonald v. ———*, cited, 199, note 2, it seems to be implied that the proof of lesion arising to the minor would be sufficient to set aside his obligation, even when he carries on a trade or profession. But this opinion, which is briefly and incidentally expressed, may probably relate to obligations not granted in the ordinary course of his trade. Obligations which are so granted do not appear to be challengeable on the mere ground of lesion.

¹ A bill was reduced on this ground, while in the hands of the seller of the goods, in the case of *Dundas v. Allan*, 17th Jan: 1711, Morr. 9034.

² This appears to have been the ground on which the bills were sustained in the case of *Campbell and Curators v. Turner*, *supra*, 200, note 4.

³ *Bayley*, 44; *Williams v. Harrison*, there noticed; and *Williamson v. Watts*, 1 Campb. 552.

⁴ *Inglis v. Sharp's Executors*, 5th Feb. 1031, Morr. 8941.

was partly the ground of decision in a case ¹, where the Court sustained an acceptance granted by a young man of rank, aged fifteen, who held a commission in the army, for furnishings to him by a toyman. For, although it was admitted that a father could not have been bound for such furnishings under the obligation to aliment his children, yet, as most of the articles furnished were such as young men of rank usually have, the Court held, that the circumstance of the minor bearing a commission rendered his obligation for them valid against him, and effectual to attach his own estate. The same principles were adopted, though with a different result, in a case ², where a haberdasher brought an action against a minor and his father, for the amount of a bill drawn by him on the minor's father, (but dishonoured by the father,) partly for money lent, and partly for goods furnished to the minor. As the minor was apprenticed to a surgeon, who had orders to make him all necessary advances, the Court dismissed the action so far as regarded the money lent, and certain furnishings which were accounted superfluous, but sustained it to the extent of necessary furnishings. In a later case ³, where a minor on the eve of majority had joined another party in accepting a bill to an innkeeper for reasonable furnishings made by him to them during their residence at his inn, on a shooting excursion, (the innkeeper not being informed, and having no reason to believe that he was minor,) he was found liable, in a question with him and his guardians, for half the amount of the bill, (his co-acceptor having paid the other half,) though a charge given him on the bill during his minority was suspended as irregular. In an analogous case in England ⁴, the term necessities was held to include what was usual and suitable in the minor's rank; and it was accordingly determined that a minor, who was a captain in the army, was liable for the price of a livery to his servant, as it was necessary that he should have a servant, although he was found not liable for

¹ Johnston v. Maitland, 20th Nov. 1782, Morr. 9036.

² Scoffier v. Read, 26th July 1783, Morr. 8936.

³ Wilkie v. Dunlop and Co. and Anderson, 29th Feb. 1834, 12 S. D. B., 506, and F. C.

⁴ Hands v. Slaney, 8 T. R. 578.

the price of cockades furnished to some of the soldiers in his company.

It seems to have been held in England, that a minor cannot be bound by a bond stipulating interest, though it is alleged to be granted for necessities¹; and it has also been doubted, whether a *negotiable* bill or note granted by a minor for necessities will bind him even with reference to the original party; the objection being, that such a document might get into the hands of an onerous indorsee, who would not be bound to discuss the original consideration². On the other hand, it is said that a promissory-note for necessities would be valid, if made payable only to the person who supplied them³. But such a distinction would not be admitted in Scotland. The general rule of our law is, that any obligation granted by a minor is null, when granted without consent of his curators, or reducible on the ground of lesion; and, as this rule arises from the supposed incapacity of the obligant, it invalidates the obligation, whether in the hands of the original creditor, or even of an onerous indorsee. The plea, that the obligation was granted for necessities, forms only an exception to this rule; and, therefore, it must be stated by an indorsee as well as by the original creditor, otherwise the obligation, even while in his hands, will be challengeable. But such a defence seems to be equally effectual, whether the obligation has been granted with or without a clause of interest.

3. If a minor induces any party to take his obligation, by representing himself as major, his fraud will exclude him from setting aside the obligation; but the result will be different if the creditor knew of his minority, and caused a statement that he was major to be inserted in the deed merely to render it valid⁴.

These doctrines seem applicable to a minor female, whether married or unmarried. The effect of marriage on obligations

¹ *Fisher v. Mowbray*, 8 East. 330.

² *Williamson v. Watts*, 1 Campb. 552; *vide* note, 553, referring to *Trueman v. Hurst*, 1 T. R. 40; and *Bartlett v. Emery*, *ibid.* 42, note a.

³ 1 Camp. 553, note.

⁴ *Erskine*, i. 7, 36; *Kennedy*, 23d Feb. 1665; *vide* also *Wilkie*, *antea*, 202, note 4.

contracted by the wife during its subsistence, which is the same whether she be minor or major, shall be afterwards considered.

A bill, though drawn on a party while he is minor, will be a good obligation against him, if not accepted till majority¹. But it will be necessary that the acceptance should be dated, otherwise it will be presumed to be of the date when the bill was drawn. A promise made after majority to pay a bill or note subscribed during minority, will exclude the power of challenge². But such a promise, according to the law of Scotland, must be in writing, although it would not probably require a separate stamp, as it does not form a distinct obligation, but refers to a previous obligation. A promise to pay *part*, or even a partial payment, will not validate the whole bill or note, though it would validate an informal contract on the ground of homologation; for the only thing necessary, with an informal contract, is to prove the contract; whereas, here, though proved, it is voidable entirely, on the ground of minority and lesion, and the power of rescinding it cannot be considered as renounced without a new and express promise³.

The acceptor of a bill drawn by a minor cannot, it is believed, plead the drawer's incapacity as a defence against an onerous indorsee, although his author, to whom the minor indorsed it to be discounted, should have misapplied the money, minority being a plea exclusive to the minor himself⁴. But in a case, where an action was brought by the

¹ This was ruled by Gibbs, C. J., in *Stevenson v. Jackson*, 4 Camp. 164.

² *Per* Lord Ellenborough, in *Taylor v. Croker*, 4 Esp. 187. In a recent case, *Bennet and Macfarlane v. Burgess and others*, 27th May 1828, 6 S. and D. 854, where a party had accepted, after majority, a bill in favour of his tutor and curator, for the balance said to be due on his accounts, it was held to be no ground for reducing the bill, that the tutor and curator had not rendered his accounts. But the Court, (First Division,) expressed doubts, whether, under these circumstances, he would be allowed to exact payment of the bill, and thought that this must be investigated for the accounting.

³ *Vide* *Thrup v. Fielder*, 2 Esp. 628, the principles of which, though an English decision, appear to be applicable to the law of Scotland.

⁴ In *Taylor v. Croker*, 4 Esp. 187, Lord Ellenborough held, that, although the plea might have been good to the minor, if the action had been brought against him, it could not void the right of an indorsee who brought the action, though he derived his title through the minor. *Vide* also *Jones v. Darch*, 4

payee of a bill said to be drawn by a minor against the acceptor, a proof of minority was allowed to the defendant, though it failed ¹. As there was a privity in this case between the drawer and the plaintiff, the minority of the former was probably a good defence, even to the acceptor; since, if he had paid the bill, the drawer might, on account of his minority, have refused him credit for the payment. But this would have been no defence against an indorsee. Nor can the drawer or indorser of a bill accepted, or the indorser of a note granted by a minor, found any plea on his minority, since such drawer or indorser would be still liable under his draft or indorsation, although there had been no acceptance ².

A minor may be payee or indorsee of a bill or note which is for his benefit. But if a debtor pays the amount to a minor having curators without a discharge from them, he will be liable in second payment, unless in so far as he can shew that the money has been employed for the minor's advantage ³. In one case, where a father was in embarrassed circumstances, and not resident in Scotland, the Court held, that a person indebted to his children in a bond for £.500 was not bound to pay it even to him as their administrator, until he found security for its proper application ⁴. On the other hand, a minor without curators has, by law, the full administration of his affairs, and no Court can force him to name curators. It was, therefore, decided ⁵, that he was entitled, without curators, to receive and discharge half of a moveable succession which had been left to him. But his right so to discharge had been much doubted in a previous case ⁶; and, in a later case ⁷, where a minor without curators brought an action for payment of an heritable bond, the Court held, that the debtor

Price, 300, where the defendants knew, when they received the bill, that the indorser was a minor; also *Grey v. Cooper*, 3 Douglas, 65.

¹ *Jeune v. Ward*, 2 Stark. 330.

² In *Haly v. Lane*, 2 Atk. 182, this doctrine is laid down as applicable, whether the bill or note has been accepted or granted by an infant or by a married woman. With regard to the case of married women, *vide post*.

³ *Vide Ersk. i. 7, 37*, as to the inefficacy of payments made to minors.

⁴ *Graham v. Duff*, 22d Feb. 1794, *Morr.* 16383.

⁵ *Hochler v. Niddrick*, 31st Jan. 1772, *Morr.* 8975.

⁶ *Hay v. Grant*, 22d Feb. 1749, *Morr.* 8973.

⁷ *Kirkman v. Pym*, 1st Aug. 1782, *Morr.* 8977.

was not obliged to pay it, although, on his agreeing to do so upon receiving security for his indemnification, they remitted to the Lord Ordinary to adjust the terms of the security. They appear to have distinguished in this case between principal sums and rents or interest, holding that minors might discharge the latter, as they might be presumed to be needed for their ordinary sustenance. But when debts, whether by bill or otherwise, are not clearly of this description, it would appear that the debtor is not bound to make payment to a minor, unless there is a curator who can discharge him, as he might be liable to a challenge of the whole transaction, if the minor should squander the money. Even security for due application of the money does not appear to be sufficient, since any debtor may insist, before payment, that he shall have a full discharge.

II. A wife cannot in general bind herself by a bill or note, or any personal obligation during the subsistence of the marriage, even with her husband's concurrence¹. On this ground it was held, in one case², that a bill drawn by a husband upon and accepted by his wife was null as to her; and that, having been accepted, (though the acceptance was void,) it could not be the foundation of summary diligence against him as

¹ *Vide* cases reported in *Morr. 5957-80*; also *Thomson v. Elder*, 4th Dec. 1827, 6 S. and D., 204, and F. C., where the Court refused action against a wife on a bill accepted by her and her husband, though she had a separate property, this property consisting in a liferent, which, however, had been left to her under condition that it should not be liable for her debts or those of her husband; *Thomson v. Cross*, 27th Nov. 1828, 7 S. and D., 71, where a suspension by a married woman, of diligence on a bill granted by her, was passed without caution, and *Sym v. Gibb and others*, 26th Nov. 1825, F. C., where the Court decided, that an action against a married woman, on her acceptance for £.7, 7s., was null, so as not to fall under the act of Sederunt 1788, regarding the payment or consignation of previous expenses, in suspensions of decrees in absence pronounced by inferior judges. But in a recent case, *M'Kenzie v. Fraser*, May 1827, 5 S. and D. 679, and F. C., where an action was brought on a bill drawn by a married woman, and accepted by a third party, it was decided, 1st, That, as the wife and her husband had made no appearance in the action, though both were called in it, decree must be pronounced against them; and, 2dly, That, they being liable, the objection founded on the circumstance of the drawer being a married woman was *jus tertii* to the acceptor.

² *A v. B*, 17th Jan. 1736, *Elchies, v. Bill*, No. 12.

drawer, under the acts 1681 and 1696, but must be recovered by an ordinary action.

If the wife has a separate property, exclusive of her husband's *jus mariti*, she may grant a security over it; but a personal obligation by her, though included in the same deed with the security, for instance, in an heritable bond, will be ineffectual¹. The creditor may have a claim, after dissolution of the marriage, against her estate on such an obligation, in so far as the money advanced on the faith of it has been expended for her benefit. But there can be no action against her², or diligence against her person during the subsistence of the marriage on such a claim³, or even on claims contracted by her before the marriage, although there may upon obligations *ad factum præstandum*⁴. Personal diligence is likewise competent against her, after dissolution of the marriage, on obligations granted during its currency, but only in so far as these were obligations for debts due by her at any rate⁵, or in so far as the money advanced on them has been expended for her benefit⁷.

There are some exceptions, however, to the doctrine of a wife's incapacity to contract personal obligations.

1. As she is *præposita negotiis domesticis*, she is entitled, in that character, to bind her husband, not herself⁸, for furnishings, so far as necessary for herself or the family, though her

¹ Both these points were decided in *Menzies v. Gillespie's Creditors*, 8th Dec. 1761, *Morr.* 5974, and *Watson v. Robertson*, 10th Dec. 1772, *ibid.* 5976.

² *Harvey and Fawel v. Chissel's Trustees*, 21st Feb. 1791, *Morr.* 5980. This was an action on a cautionary obligation granted by a wife with her husband's consent for behoof of her son, but which the Court found to be null. *Vide* also *Nairne v. Mercer*, 17th Nov. 1785, *Morr.* 5860, where the principle mentioned in the text was distinctly acted upon; but *vide Thomson v. Elder*, 206, note 1.

³ *Thomson v. Elder*, 206, note 1.

⁴ *Gordon v. Pain*, 5th Dec. 1738, *Morr.* 6079.

⁵ *Anderson v. Buchanan*, 27th July 1775, *Morr.* 6081.

⁶ *Primrose v. Watson*, 13th Jan. 1610, *Morr.* 5982; *Home v. Countess of Moray*, 18th June 1667, *id.* 5983.

⁷ *Libbis v. Countess of Orkney*, 12th Dec. 1609, *Morr.* 5982; *Neilson v. Arthur*, 23d Feb. 1672, *id.* 5984.

⁸ This was decided, even when the wife had written letters promising expressly to pay the debt, in *Mitchelson v. Lady Cranstoun*, 12th Dec. 1780, *Morr.* 5886.

husband should have given her money to purchase them¹. But, when money is borrowed by the wife in this character, the lender must shew both that it was needed at the time, and expended on necessary furnishings. Farther, though she can bind her husband for furnishings, she cannot make him liable for interest not otherwise due, by granting a bill or other obligation bearing interest². Such a document, as to herself, is null. Her *præpositura* lasts while she remains in family with her husband, unless he recalls it by inhibiting her. He may likewise, either expressly, or by acts inferring acquiescence, constitute his wife manager of a particular branch of business; and, in that case, all her contracts in such business will be binding, not on her, but on him³.

2. When a wife has been separated from her husband by judicial, or even voluntary separation, receiving a fixed allowance from him, her husband is no longer bound for her debts, seeing her *præpositura* falls. On the other hand, as she has now a separate stock, her obligations are binding to the effect of attaching it⁴, or, in case of a *judicial* separation, which has taken away her husband's right to her society, and consequently his interest to prevent her imprisonment, they may perhaps be made the ground of diligence against her person. Even in the case of voluntary separation, such obligations, being originally valid, may probably be made the ground of personal diligence against her after the marriage is dissolved, when the husband has no longer a claim to her society. The English courts have adopted a different doctrine from that now stated, with regard to voluntary contracts of separation⁵, holding, that as husband and wife are in law one person, no such contract of separation can exist between them, or change the relation established between them by law, so as to render the wife capable of per-

¹ Erskine, i. 6, 26.

² In *Forrest v. The Earl of Sutherland*, 24th Nov. 1749, *Morr.* 478, a wife having accepted a bill for furnishings made to her, on which action was raised against her husband, concluding likewise for interest from the date of the bill, the Court found him liable for the furnishings, but not for the interest stipulated.

³ Ersk. i. 6, 26.

⁴ *Ibid.* Vide *Robins v. Lady Southesk*, 6th July 1688, *Morr.* 5955.

⁵ *Marshall v. Rutton*, 8 T. R. 545; decided after an argument before all the Judges, *per* Kenyon, C. J., who delivered the judgment.

sonal obligations. Our law, on the other hand, has held, that though such contracts may be revoked by either of the parties agreeing to live with the other, they must, till then, receive full effect¹. Indeed, even the English courts of equity have determined, that when a wife is separated from her husband, by a contract which vests a distinct property in trustees for her use, a promissory-note² or bill³ accepted by her will be effectual against that property.

3. When the husband has left Scotland, the wife may bind herself for furnishings made for her or her family's use⁴, or for goods furnished to her in any trade⁵, and likewise for a bill granted in such trade⁶. Indeed, if she engages in trade, she will be liable for obligations in the course of it, whether her husband has left Scotland or not⁷. The same doctrine appears to be established, both in the old and in the modern law of France⁸. But it does not seem that diligence could be used on such obligations against the wife's person during the marriage, though it may be used after its dissolution. Indeed, she does not appear to be liable, in general, to personal diligence on such obligations, even though her husband was

¹ 2 Bell, 166-7.

² In *Bullpin v. Clarke*, 17 Ves. jun. 365, this was decided with regard to a promissory-note granted by the wife in the form of a letter, which could not have been negotiated.

³ In *Stewart v. Lady Kirkwall and others*, 3 Madd. 387, this was decided in the case of a bill accepted by the wife; the Vice-Chancellor holding, that though a *femme covert* could not contract debt so as to subject even her separate property to general demands, the document in question was effectual as an order on her trustees to pay the money out of her estate, and as a ground for restraining them from making payments to her till this debt was paid.

⁴ *Gairns v. Arthur*, 19th Dec. 1667, Morr. 5954.

⁵ This was decided with regard to furnishings made in the course of trade, in *Russell v. Paterson*, 19th March 1629, Morr. 5955, and *Hay v. Corstorphin*, 23d June 1663, Morr. 5956.

⁶ *Churnside v. Currie*, 11th July 1789, Morr. 6082. A husband having left Scotland in bankrupt circumstances, and his wife having entered into trade to support herself and her children, the Court refused to suspend a charge of horn-ing given her on a bill which she had granted in the course of trade.

⁷ *Hog v. Little*, 9th Jan. 1611, Morr. 5955. A bond granted by a wife who kept an inn, though inhibited by her husband, was notwithstanding found effectual against her, and a reduction by the husband was dismissed, it being understood that the creditor renounced all execution on it against him.

⁸ Pothier, No. 28; Pardessus, No. 41.

out of Scotland when they were contracted. In a case already cited¹, the Court seem to have assumed that personal diligence was competent. But they did so, on the ground, that a married woman, under such circumstances, would not otherwise get credit to support herself and her family,—a reason of expediency, which is justly considered by a learned author as insufficient to decide a point of law². The principle of a wife's exemption from personal diligence, even for debts affecting her separate stock, appears to be, that her husband is entitled to her society, and that, therefore, to deprive him of it by imprisoning her, is to make him pay these debts, that he may release her. This right ceases by attainder, and therefore a wife has been found liable for personal obligations contracted after her husband's attainder³, which would probably, on the same principle, have been held to authorise diligence against her person. But it is doubtful whether this rule would apply, as has been suggested⁴, when the husband has merely been guilty of such desertion as would warrant a divorce, or has been transported as a criminal. In the last of these cases, his civil rights, (and among others, the right to his wife's society,) remain, except in so far as his sentence affects them. But its effect is merely temporary, while there is no security that the wife's imprisonment for debt, if permitted, would terminate at the same time with it, though the husband would be then entitled by law to her society. On the other hand, although the husband's desertion may entitle a wife to sue for a divorce, yet, if she does not, his right to her society is entire. It may be doubted, therefore, whether, in these cases, his right should be interfered with by allowing diligence against her person.

In England, a wife's liability, under the circumstances now mentioned, to personal diligence, seems to have been always mixed up with her liability to an action; as one of the first steps in a process there is, to arrest the defendant and hold him to bail. The English courts, proceeding on this view, decided at first, that a wife living apart from her husband, on

¹ *Churnside v. Currie*, *ante*, 209, note 6.

² 2 Bell, 167, note 1.

³ *Ball v. Countess of Southesk*, 29th June 1733, *Morr.* 6002.

⁴ 2 Bell, 167, note 1.

an allowance under a voluntary contract of separation, was liable, as seems to be implied, both to action and diligence¹. But the contrary was at last settled, after full deliberation, in a case already cited², subject, however, to certain equitable exceptions, likewise already referred to³, which have brought the rule in England, regarding the case of voluntary separation, nearly to the Scotch doctrine.

Another peculiarity of the English law is, that, though a wife should be engaged in trade, she cannot in general bind herself by any contracts entered into during the course of it, except in London by special custom⁴. But, where the husband was out of the kingdom, the necessity of enabling the wife to do something for her subsistence, pleaded strongly for allowing her to contract, since she could not otherwise get credit; and this, according to English rules, appears to have implied a liability to personal diligence. It was accordingly decided in an early case, that a wife was liable for contracts made by her, while her husband was banished till he got the King's favour; which was accounted equivalent to indefinite banishment, or civil death⁵, or while her husband was an alien enemy, and consequently incapable of civil rights in this country⁶; and at last the same rule was followed with regard to contracts made by a wife as a trader, when her husband was transported only for a term of years, though his term had expired; it being held that she could not found on that circumstance without proving that he had returned⁷. These judgments do not appear to have proceeded on the ground that temporary banishment inferred civil death, as seems to be taken for granted⁸, since it infers no more than a specified

¹ *Corbett v. Poelnitz*, 1 T. R. 5.

² *Marshall v. Rutton*, 208, note 5.

³ 209.

⁴ *Beard v. Webb*, 2 Bos. and Pull. 93; *Cundell v. Shaw*, 4 T. R. 361.

⁵ *Lady Belknap's case*; cited in *Gaillon v. L'Aigle*, 1 Bos. and Pull. 358.

But see the reporter's note on *Belknap's case*, which proves that the banishment was there considered as perpetual.

⁶ *Derry v. The Duchess of Mazarine*, 1 Raym. 147.

⁷ *Sparrow v. Carruthers*, cited in *Corbett v. Poelnitz*, 1 T. R. 5, and *Carrol*

v. Bledcow, 4 Esp. 27.

⁸ *Chitty*, 25.

punishment¹. Even the circumstance of the husband being an alien enemy involves merely a suspension, not a deprivation of his civil rights. But the English courts appear to have proceeded chiefly on the necessity of rendering the wife capable, under such circumstances, of binding herself. At last, they found her liable generally to be sued on contracts made by her as a sole trader, while her husband was merely absent from the kingdom, without any obstacle to prevent him from returning. Her liability in all these cases was held to imply that diligence might be used against her person. But these decisions would not probably be precedents for personal diligence in Scotland; *1st*, Because such diligence appears to have been confounded by the form of process in England with the wife's liability to an action, whereas, in Scotland, they are distinct; and, *2dly*, Because the principle of allowing a wife who lives apart from her husband, and carries on a separate trade, to bind herself in the course of it, has been long admitted in Scotland, without distinguishing whether the husband is abroad voluntarily, or is banished, or is living in the country. The necessity of these cases being thus provided for, by allowing recourse against the wife's funds, it seems doubtful whether diligence should be likewise allowed against her person, so as to interfere with the right which the husband has to her society in all cases, unless, *1st*, When he has altogether lost his civil rights, as by an attainder; *2dly*, When he is divorced; or, *3dly*, When there is a *judicial* separation, which takes away his right to her society.

A husband is liable, so long as the marriage subsists, for bills or notes granted by his wife, even before marriage²; but he would not be liable to summary diligence on them,

¹ *Vide* on this subject the reporter's note to *Gaillon v. L'Aigle*, 1 B. and P. 358, note *f*.

² *Lesly v. Nicholson*, Jan. 1725, Morr. 5766. An attempt was here made to shew that bills ought to be considered heritable as to the husband, under the act 1661, c. 32, because interest was due on them. But the answer was, that this act referred to bonds "bearing a clause of annualrent," whereas interest was due on bills *ex lege*. The bill in question had been granted by the wife before marriage, payable at three years' date, and the husband was found liable for it on the same ground on which he would have been entitled to sue for it, if it had been granted to the wife.

seeing he is not an obligant *ex facie* of them. On the other hand, he is entitled to sue for bills or notes granted in her favour before marriage¹. If a bill or note should be granted or indorsed to a wife after marriage, the right to it would accrue to the husband. In a recent case², a charge by a wife alone on such a bill was suspended, and the nullity of the charge was held not to be remedied even by the husband's concurrence in the suspension. But the husband would not be entitled to protest such bills or notes in his own name, and then to use summary diligence, as that privilege is confined to the payee specified in the bill or note or his order, or, according to the act 12 Geo. III. c. 72, to the drawer, payee, or indorsee. The husband does not acquire right to the bill or note in any of these characters, but gets it *vi legis*. It is believed that such diligence has been allowed, in some cases, to the wife with consent of the husband. But the correctness of this practice may be doubted, since the wife has no longer any right, by virtue of which she can use diligence even with her husband's consent. It may perhaps be competent to protest the bill or note in name of the wife, as creditor *ex facie*, or in name of the husband and wife jointly, and so record the instrument of protest, and then, on producing evidence of the marriage, as a legal assignation of the registered protest to the husband, to obtain warrant for diligence in the husband's name. But this point has never been directly decided³. It has been

¹ *Gilhagie v. Orr*, 13th Dec. 1738, *Morr.* 1421. This was found even with regard to a bill bearing an express clause of annualrent, which was made payable at a year's date, and had lain over for a great many years. *Vide* in England *Hodge v. Burton*, *Bunbury*, 188, where it was decided that a note granted to a wife during marriage belonged to the husband.

² *Jeffrey v. Matheson and Husband*, 28th June 1826, 4 S. and D. 765. *Vide* also *M'Neillage v. Holloway*, 214, note 3, and *Mason v. Morgan*, 2 Ad. and Ell. 30.

³ It was lately decided in *Smith v. Selby*, 10th July 1828, 7 S. and D. 885, F. C., that summary diligence raised by the husband, after a protest in his name, on a bill granted to the wife alone, before her marriage, was inept. But it was suggested, that diligence on a protest taken in name of his wife and him would have been good, and that the husband should have produced evidence of his marriage to the Bill-Chamber, and got diligence. Reference was made in that case to 1 B. and Ald. 218, where it was held, that a husband might sue alone on a bill taken to the wife before marriage, and which became due after it. The same thing was held in a recent case, *Burrough v. Moss*, 10 B. and

decided that a bill granted to a wife, even after her marriage, exclusive of the *jus mariti*, was effectual to her alone, when the debt for which it was granted did not fall under the *jus mariti*, although the general presumption is, that all debts accruing to either party after marriage belong to the husband¹.

It has been held in England, (and the doctrine seems to be applicable in Scotland,) that as the husband becomes, by marriage, assignee to all his wife's personal claims, including bills or notes, he alone is entitled to indorse them, though taken payable to the wife before her marriage². On the same principle it has been held that he may sue alone on such a bill, without joining his wife in the action³, as has been likewise found in a Scotch case already mentioned⁴. The converse of this doctrine has been decided, viz. that an indorsement by a married woman of a note payable to her or order after marriage was null, as the right to it vested in her husband⁵. This was held, even when the defendant had granted the note to the wife, to enable her to discharge a debt to the plaintiff, contracted in a trade which she carried on with her husband's

Cr. 559. But this was answered by the distinction between action and summary diligence, as to the latter of which it was held, that the creditor's right must be complete *ex facie* of the proceedings. It has been held, in *Richards v. Richards*, 2 B. and Ad. 447, that when a wife, as administratrix to a former husband, lent money, recovered by her as such, to her present husband, on a joint and several note by him and two other persons, she might sue the two other makers on it within six years after her husband's death, (the six years running against her, by the statute of limitations, only from that term,)—that it was not null as a note, as depending on a contingency, and that interest was due to her on it from its date.

¹ *Mungal v. Calder*, 11th Jan. 1750, Morr. 5771.

² On this ground, in *Connor v. Martin*, cited by Denison, J., the indorsement of a note by a married woman was found ineffectual, it being held that her husband could alone indorse it. This case was cited in *Rawlinson v. Stone*, 3 Wils. 5, where it was decided that the indorsement of a note by the administratrix of the payee was good by the custom of merchants.

³ *M'Neillage v. Holloway*, 1 B. and A. 218.

⁴ *Ante*, 213, note 1.

⁵ *Barlow v. Bishop*, 1 East. 432; 3 Esp. 266. The same doctrine is laid down by Parker, C. J., in *Miles v. Williams*, 10 Mod. Rep. 245. The case related to a different matter. The same point was decided in Scotland in *Smith v. Binny*, 26th Jan. 1836, Fac. Coll.

knowledge. In Scotland her indorsement or subscription of bills or notes in such a trade, would have been valid. But it has been held ¹, that the indorsement of a bill by the wife, with the husband's consent, and that of the acceptor, effectually transfers the bill, and gives action on it against the acceptor. In another case, where the defendant promised to pay a note thus indorsed, it was held to be presumable that the wife had indorsed it by the husband's authority, and that the defendant had barred himself from disputing it ². It is thus held in England, that though a wife cannot indorse or subscribe a bill or note in her own name, she may do so by her husband's authority. But the sound doctrine appears to be, that, as she signs in this case merely as procurator for her husband, he, and not she, is bound by her signature ³. In the case last cited, it may be doubted whether there was reason to presume an authority from the husband, or whether the defendant's promise met the objection against the plaintiff's title. In this case there is a want of title; whereas, in the case already mentioned ⁴, of a bill indorsed by a minor, the title is good, provided the minor does not exercise the privilege, personal to himself, of challenging the indorsement.

If these principles are correct, no holder of a bill or note in which a married woman is payee and first indorser, though it should have been indorsed to him by a third party, can sue the drawer or acceptor; because their obligation is null, in as far as regards the payee, through whom he claims right. But the holder of such a bill or note has a good claim against his immediate indorser on his indorsation; and when the bill or note has been accepted or granted by a married woman, he has a claim against all the indorsers. This doctrine has been already discussed with reference to the case of minors ⁵.

¹ *Prestwick v. Marshall*, 4 C. and Pay. 594; 7 Bingh. 565.

² *Per Lord Ellenborough*, in *Cotes v. Davis*, 1 Camp. 485.

³ *Pothier*, No. 29.

⁴ *Taylor v. Croker*, *ante*, 204, note 2. This may perhaps account for the apparent inconsistency between the law regarding married women, and that regarding minors, as noticed 1 Camp. 485, note.

⁵ *Ante*, 204.

3. As interdiction affects only heritable property, the interdicted person may, without consent of his interdictors, grant bills or notes which will be binding against his person or his moveable property, but not so as to affect his heritage, unless they consent, or unless it can be shewn that full value was given for it¹. His subscription of a bill or note, however, is effectual in itself, though it may be set aside, if granted without consent of the interdictors, in so far as it can affect his heritable estate.

In a recent case² a suspension was passed on caution, at the instance of the acceptor of a bill and his interdictors, even against an indorsee, on the allegation that the bill had been accepted blank, after publication of the interdiction, and indorsed without value, though the indorsee pleaded onerosity and *bona fides*. The suspension must have been intended merely to prevent the constitution of the debt against the acceptor's heritable estate.

4. Alien enemies during war cannot be parties to bills or notes with British subjects. This rule, with the limitations to which it is subject, has been already discussed³.

5. It seems to be doubtful in England, whether corporations can contract except by deeds under their seal, and whether, therefore, they can grant bills or notes, which are writings not under seal, unless permitted to do so by special statute⁴. In Scotland, they may grant bills or notes, as well as other obligations, by the subscription of their office-bearers for the time. These officers do not bind themselves personally, but the corporation. Any action, therefore, or diligence for payment is not directed against them after their office has expired, but against the office-bearers for the time, though they have not granted the obligations; and even they, not

¹ *Vide* Ersk. i. 7, 57-8.

² *Scott v. M'Nillidge*, 14th Feb. 1835, 13 S. D. B. 469.

³ *Ante*, 118, *et seq.*

⁴ *V. Bayley*, 67 8, who is favourable to their common law right of granting bills or notes, at least in some cases, and *Chitty*, 17. *Vide* also cases cited by both authors, particularly *Slark v. Highgate Archway Company*, 5 Taunt. 794, and *Broughton v. The Manchester Water Works Company*, 8 B. and A. 1.

being personally liable, are entitled to absolvitor on making over the funds of the corporation ¹.

Under the exceptions which have been now mentioned, all persons may become parties to bills or notes.

¹ *Bowie v. Wilson and others*, 7th Feb. 1695; *Cleland v. Magistrates of Pittenweem and others*, 10th July 1752; *Livy v. Mudie and others*, 6th Aug. 1774; *Anderson v. Morton and Alexander*, 18th Nov. 1779, *Morr.* 2510.

SECTION II.

In what manner, or under what characters, Obligants may become Parties to Bills or Notes ?

The different characters of drawer, indorser, or acceptor of bills or notes, under which a person may become a party to them, have been already described. The rights and obligations arising from the acceptance or payment of bills or notes under protest, which belong properly to the character of a creditor, shall be afterwards discussed in considering the negotiation of bills and notes.

No person can, in general, become bound as a party to a bill or note, unless *his name* or that of the firm to which he belongs appears on some part of it¹. In one case, where the agent of a company having drawn bills in his own name, discounted them, when accepted, with a bank, (the acceptor, who happened to be debtor of the company, having also been informed in a letter to him from the drawer, that the

¹ In *Fenn v. Harrison*, 3 T. R. 760, the Court of King's Bench held, that the defendants ought not to be subjected for a bill which had been discounted with the plaintiff, as their names were not upon it, though they had given it to a third party to get it discounted. A verdict had been at first found against them, and was afterwards confirmed; 1st, Because this party, in representing it as their bill, was held to have acted under authority as their agent; and, 2^{dly}, Because they had subsequently promised to pay it. But the Court, while they approved of the verdict, adhered to the general doctrine already stated. In *Siffkin v. Walker*, 2 Camp. 308, being an action against two parties on a note which only one of them had subscribed, Lord Ellenborough non-suited the plaintiff, although he offered to prove that it was granted for a debt due by them jointly. In *Emly v. Lye*, 15 East. 7, a bill drawn in name of one partner only of a firm was found to give the discounter no claim against the firm, even for money had and received, though the bill was discounted with the plaintiff through the same agent who had formerly discounted with him bills drawn by the firm, and though the proceeds had been applied for behoof of the partnership.

In Scotland, the Court appear to have held the same opinion in the case of *Harrisons v. Chippendale*, 9th Dec. 1794, Morr. 1620, with regard to a claim made against a bankrupt estate, where the names of the bankrupts were not on the bills, either as drawers, indorsers or acceptors. But as it was said that these bills were merely deposited in security of a debt due by the bankrupts, and which could be proved *abunde*, the Court remitted to the Lord Ordinary to hear parties on that subject.

bills in question would be placed to his credit with them,) the Court of Session found the company liable in an action on the bills, on the ground that the drawer had drawn and discounted the bills as their agent and for their behoof¹. But the judgment has been reversed on appeal, and the reversal appears to be conformable with the doctrine now stated. The circumstance of the funds raised by discounting the bills, being applied to the company's use, was a matter between them and their agents, with which the discounters had no concern². In a later case³, certain trustees were found liable for the amount of a promissory-note, which the manager of a coal-work, forming part of the trust, had granted in his own name. But this was found, not in an action on the bill, but in an action brought on the authority alleged to be given by the trustees, both directly and *rebus et factis*, to sign bills on their account in the business of the trust. If a person subscribes his own name, adding to it the words "and company," though he has no partners, he will be personally liable; and it has been found that cautioners in a cash-credit applicable to all bills which may be subscribed in name of a certain person, are liable under their bond for bills subscribed by him in this manner⁴. How far it is necessary that a party should, by himself or others, actually *subscribe* the bill or note, has been already considered⁵.

A person may become a party to a bill or note as executor for a party deceased. An executor acquires right to all bills or notes that belonged to the deceased, and is entitled to indorse them⁶. But it has been decided in England⁷, that, when a bill was given to a party as *administratrix* for a per-

¹ Telfer v. James Wood and James, 5th Feb. 1822, 1 S. and D. 290, and F. C.; 2 S. App. Cas. 219.

² See this subject discussed afterwards, under the head of Partnership.

³ Murray and McGregor v. Campbell and Co., 28th Nov. 1827, 6 S. and D. 147, F. C.

⁴ Booth and others v. The Commercial Bank, 16th May 1823, 2 S. and D. 211, and F. C.

⁵ *Ante*, 43, *et seq.*

⁶ In Fair v. Cranstoun, 53, note 3, the son and executor of a person deceased was found entitled to fill up his own name as drawer. In Rawlinson v. Stone, 3 Wils. 1, the Court of Common Pleas held that a note payable to a person deceased was effectually conveyed by an indorsement from his *administratrix*. The same doctrine is laid down in King v. Thom, 1 T. R. 487.

⁷ Catherwood v. Chabaud, 1 B. and Cr. 150; 2 D. and Ryl. 271.

son deceased, and as forming part of his estate, the right to sue on it, upon the administratrix's death, accrued, not to her representative, but to the representative of her constituent. How far an executor is personally liable by virtue of his indorsation, shall be afterwards considered.

Procuration.

An individual may become a party to a bill or note, not only by his own deed, but by that of his agent acting under his authority; and, in this case, he is said to draw, indorse, or accept by procuration. As such agency implies personal trust by the constituent in his agent, the latter cannot devolve the trust thus reposed in him on another, unless he has powers to that effect.

Parties whom the law deems incapable of protecting their own interests, as minors, or married women, may yet subscribe bills or notes as agents for others, since persons are entitled to entrust their interests to whomsoever they choose. But pupils, or those destitute of reason, must be excepted, because they cannot accept or exercise any office which requires consent. It has been said, that parties whose own rights are out of the protection of the law, as persons attainted or outlawed, or alien enemies, may yet contract by authority of others¹. But it may be questioned whether the law can recognise them as thus discharging an office authorised by it, when they have no legal *status*; or whether they could assert the rights of such an office, while they enjoy, by law, no rights whatever.

With regard to the manner in which a procuration to sign bills or notes is constituted, it may be,

1. By a special written mandate. It was once held, that a formal power of attorney was in general necessary, though capable of being supplied by acts and deeds that inferred mandate². In one case, indeed, a special mandate seems to have been held universally indispensable³; but the House of Lords, on an appeal, were of opinion that procuration might be inferred without such a mandate. Procuration may therefore be constituted, *2d*, In England by a verbal mandate⁴, though

¹ Chitty, 31.

² Marius, 104; Beawes, No. 86, v. Bills of Exchange.

³ Davison v. Robison, 3 Dow, 218.

⁴ This has been held in England, it being laid down by Holt, C. J., in 12

it may be doubted whether a mandate, without writing, would be effectual in Scotland; 3*d*, By delivering to any person a blank bill stamp subscribed, which may be considered as a mandate to fill up the blank in what way he pleases¹; 4*th*, By acts of the principal, which imply his authority to the agent to subscribe for him, such as his approving of bills drawn on his account, during his absence, which will sanction such bills, if drawn afterwards by the same party², or by paying bills drawn with his name as drawer, by a person connected with him in trade³, or by allowing a person

Mod. 564, that, if a bill is indorsed for a person's behoof by his verbal order, it is the same as if he had done it himself. The same doctrine is implied in *Porthouse v. Parker*, 1 Campb. 82, where the acceptance of a bill by one party for behoof of another, (in consequence, as would appear, of verbal orders,) was found binding on the latter, and was likewise held to imply an approbation by the house in which he was a partner of the drawing of the bill in their name.

¹ *Collis v. Emmett*, 1 H. Bl. 313; *Russell v. Langstaff*, 2 Dougl. 514, *ante*, 68 and 75; *Snaith v. Mingay*, 1 M. and S. 87. In this last case, a bill drawn blank in Ireland, and filled up in England, was recognised in England, it being held that the date of drawing was the date of the bill. In *Crutchley v. Clarence*, and *Crutchley v. Mann*, *ante*, 94-5, the payee's name had been left blank, and was filled up by the person claiming on the bill.

² *Beawes*, No. 86, Mar. 105.

³ In *Barber v. Gingell*, 3 Esp. 60, the defendant was found liable as acceptor of a bill, though his acceptance was said to be forged, in respect that he had paid several bills drawn by the present drawer, who had been connected with him in business, and with his name added as acceptor, which Lord Kenyon held to be an adopting of the present acceptance. The same principle was recognised in *Helmsley v. Loder*, 2 Campb. 450, by Lord Ellenborough, who expressed an opinion, (though indeed there was also a promise to pay,) that there was no fatal variance between a declaration bearing that a bill had been accepted in a party's "own proper hand thereto subscribed," and the fact that *his name* had been signed by his wife under his authority. His Lordship "was inclined to think it should be enough to shew the name written by an authorised agent." In Scotland, it was decided in a recent case, *Jackson v. Williamson*, *post*, 222, note 1, that the fact of a signature being made for the drawer by alleged procuration for him could not be admitted to proof, under a summons, which set forth that he had subscribed. In a late English case, *Jones v. Turnour*, 4 C. and Pay. 204, procuration to indorse was inferred from the circumstance of the party's son, (as he was held to be, from the evidence of the holder's clerk,) having been in use to sign bills for her *per* procuration, which were paid, combined with the fact, that the defendant (drawee) had accepted the bill, which was thus drawn, as well as indorsed. *Vide* also a similar case of implied procuration, *Prescott v. Flinn*, 2 M. and Scott, 19; also a case where procuration was held not to be established, *Cash v. Taylor*, 8 Law Journal, 262; *Chitty*, 792.

to sign instruments habitually for him, or in his name, though his approbation should not be directly proved¹, or by subsequent assent to the agent's subscription². In a case³, where a daughter had signed her mother's name to a bill, without

¹ In *Haughton v. Ewbank*, 4 Camp. 88, the defendant was made liable, under a policy subscribed for him by another person as his agent, on the ground of his having paid losses on former policies subscribed for him by the same person. In *Neal v. Irving*, 1 Esp. 61, the defendant was found liable, on proof that the person subscribing a policy in his name had been in the constant use of subscribing policies in his name, though it was not proved expressly that he had approved of it, or had paid losses under the policies so subscribed. It appears to have been presumed here, from the constant habit of subscribing, that the defendant knew and approved of it. *Vide* also *Smith v. Stranger*, Peake's Add. Cas. 116. This doctrine was recognised with regard to the case of a wife who is accustomed to carry on business in her husband's name, in *Barlow v. Bishop*, 214, note 5, where, however, the principle was held to be inapplicable; also in *Cotes v. Davis*, 215, note 2, and in *Anderson v. Sanderson*, 2 Stark. 204, where a wife's admission of a debt due for goods which she was accustomed to purchase for her husband in his business during his absence was held to bar him from pleading the statute of limitations.

In Scotland, in *Christies v. Fairholme*, 17th Dec. 1748, *Morr.* 4896, it was taken for granted that a party could not be bound by the forging of his name as acceptor to a bill. On the other hand, in *Turnball v. Mackie*, 26th Feb. 1822, 1 Shaw, 353, the partner of a company was found liable in summary diligence for a bill bearing to be signed by a third party *per* procuration of the company, as the bill fell within their ordinary business, which this person was proved to have transacted as manager. In *Provan v. Mackay*, 29th June 1821, 1 Shaw, 92, a person was found liable for a promissory-note to which his signature was forged, in respect that, although personally cited to an action on the note in the inferior court, a pleading was lodged in his name, (though, as he said, without his authority,) in which the forgery was not stated, and in respect it was not pleaded until he brought a suspension of the decree against him. In a later case, *Jackson v. Williamson*, 9th Dec. 1825, F. C., and 4 S. and D. 298, the validity of the signature of a certain person's name as drawer of a bill, was maintained, on the ground that it had been adhibited by another person in his presence, and with his consent. But the case was decided on other grounds, though one of the Judges intimated his opinion, that there was not sufficient evidence of the facts now stated, and, besides, that no previous practice was alleged in support of this mode of subscription, as in the English cases already mentioned. In the case of *Miller v. Leslie*, 22d Jan. 1831, 9 S. D. B. 328, the circumstance of a person having given to a third party, bills bearing to be signed for him, as genuine bills, though they were truly signed by his brother, was held to found an action against him on the bills. A similar decision was given in the case of *Meiklem*, 16th Nov. 1833, 12 S. D. B. 53.

² *Per* Holt, C. J., in *Ward v. Evans*, 2 Raym. 928; *Boulton v. Hillebrand*, Comberb. 450. *Vide* also *Kinnets v. Surrey*, cited by Payley, 3d edition, note k, and *dictum* of Buller, J., 2 T. R. 189, note, *ad finem*.

³ *Lowson v. Matthew*, 18th Nov. 1823, 2 S. and D. 502.

being authorized, her mother not being in trade, and the daughter having only signed for her about six times before, by special authority, the Court suspended a charge against the mother on the bill. Procuration may farther be conferred, 5th, By an express power of factory, whether its terms be general ¹, or whether the power of signing bills or notes, in name of the constituent, be implied ². But a power to receive and discharge money due to the constituent does not authorize the attorney to indorse on his own account bills which have been given in payment ³; and any words, however com-

¹ Clapton and Watson v. Macintosh, 20th Feb. 1700, Forbes on Bills, 12.

² In Howard v. Baillie, 2 H. Bl. 618, the Court of Common Pleas decided, that a person acting under a power of attorney from the executrix of a party deceased, was entitled, under the general powers which it gave, to settle all claims against the estate, and to accept bills in her name for debts due by the estate, (on receiving a prolongation of credit,) so as to render her personally liable. In another case, Gardner v. Baillie, 6 T. R. 591, arising under the same power of attorney, the Court of King's Bench held, that the power was limited to her liability as an executrix, and therefore did not authorise the attorney to charge her personally with any debts. It is reported to have been said by the Court of King's Bench, that the other Court had informed them, that they decided the former case on its peculiar circumstances, and not on the construction of the power, with regard to which they agreed with the Court of King's Bench. But a different account is given in H. Bl., which vide. In Attwood v. Muntings, 7 B. and Cr. 278, 1 M. and Ryl. 86, where an individual, who was partner in several concerns, had, on going abroad, left two powers of attorney, one to indorse, negotiate and discount, or acquit and discharge bills, and generally to act for his interest; and another to accept for him, and on his behalf, bills drawn by his agents or correspondents, and where his partner in one of his concerns (who was included in the powers of attorney) drew bills for behoof of that concern, which were accepted by his wife, (whose name was in both the powers of attorney,) per procuration, it was decided, 1st, That the special words of the first power did not cover such a case; 2d, That the general powers given by it must be construed with reference to the special purposes previously defined; and, 3dly, That the second power did not apply to bills drawn by his partner, or for partnership purposes, but only to such as were drawn in his individual concerns. Vide, as farther illustrative of the doctrine in question, Hayleir v. Hawke, 5 Esp. 75, and Alexander v. Gibson, 2 Campb. 555.

³ In Hog v. Snaith and others, 1 Taunt. 347, this was decided with regard to two navy bills, which an agent, acting under a power of this kind, indorsed on his own account to his banker, the indorsement being held to be beyond his powers, which were merely to receive money for his principal, and no regard being paid to an alleged contrary usage respecting the indorsement of navy bills. On the same principle, it was held, in Kilgour v. Finlayson, 1 H. Bl. 155, that the partner of a dissolved company could not, by virtue of powers to uplift the company debts, draw or indorse a bill to a third party in name of

prehensive, which are annexed to a power of attorney, must be construed with reference to the specific purpose for which it was executed¹. In general, when an attorney's powers are limited, he cannot bind his constituent by any act which exceeds them².

Mandates terminate, in general, by the death of the mandant or mandatary ; by the insanity of the latter ; by revocation ; by renunciation ; or by the sequestration of the mandant, which vests his estate, and all the rights connected with

the firm, so as to bind the company, though the money raised by discounting it was applied in payment of a company debt.

¹ Erskine, iii. 3, 39. In *Hay v. Goldsmith*, 2 Smith's R. 79, a power of attorney to receive money due to the mandant, "and transact all business," was held by the Court of King's Bench not to entitle the attorney to indorse bills received in payment in the principal's name, so as to render him liable for them to third parties, the general words now quoted being considered as limited by the preceding specification. A similar decision was given in *Murray v. The East India Company*, 5 B. and A. 204. *Vide also Attwood v. Munnings*, 223, note 2, and *Esdaile v. La Nauze*, 2 You. and Coll. 394.

² In *Watson v. Bank of Scotland*, 15th May 1806, *Morr. App. to Mandate*, 4, a country agent for the bank having given a receipt in name of himself and son, for money lodged with him at the bank-office, the Court of Session found the bank liable for the money ; but the House of Lords reversed their judgment, thus holding that he had not received it under the mandate from the bank. A different decision was pronounced by the Court of Session in a later case, *Normand v. The Commercial Bank*, 4th July 1823, 2 S. and D. 452, where a party who had deposited a bill with a bank agent to recover payment, on a letter from him promising to be accountable for it, was found to have a claim for it against the bank, on payment being made to them. The receipt for it did not bear to be granted "as agent ;" and it was said that the agent, after getting the bill, had discounted it on his own account with the bank, who had thus already paid full value for it. But the Court held it to be proved, by an entry of it in the bank-books, that the pursuer had entrusted it to the bank. In *Armstrong's Assignees v. Leith Banking Company*, 29th June 1831, 9 S. D. B. 839, where a third party attempted to subject a bank for bills apparently discounted with their agent, the bank was absolved, on the ground that the pursuer had trusted to the agent's personal credit for the amount of the bills. In *Fenn v. Harrison*, 218, note 1, the Court of King's Bench at first granted a new trial, on the averment that the defendants, though they gave the bill to a third party to be discounted, told him that they would not indorse it ; but the proof of this having failed, the jury found against the defendants, and the Court approved of the verdict, holding, that the powers of the defendant's agent to bind them for payment of the bill were unlimited. It was thus implied that they would not have been bound, if he had appeared to exceed his powers. Similar doctrine was held by Lord Kenyon, where an agent had exceeded his powers in making a purchase, in *East India Company v. Hensley*, 1 Esp. 111.

it, in his creditors. The mandatary's bankruptcy does not appear to be inconsistent with the continuance of his mandate.

But the rights of third parties are differently affected by its termination, from the cause now stated, according as they have or have not been led to believe in its continuance. Any person allowing another to exercise a general management of his affairs, whether by express or tacit mandate, contracts thereby an implied obligation to the public, that the mandate shall be held *quoad* him as continued, until its termination becomes notorious, or has been made known to the party contracting. In this view, as the mandant's death and bankruptcy are notorious events, the presumption is, that every person is aware of them; and, therefore, contracts made subsequently with the mandatary, or acts performed by him, will not be valid, unless it is proved by the parties making them that these events were unknown to the mandatary or the contracting party, and could not have been known by ordinary diligence. Farther, if a factor has advanced money, before his constituent's death¹ or bankruptcy, on the faith of goods consigned to him, he will be entitled, even after these events, to sell the goods for his indemnification². Such advances change the contract from mandate to loan and security. But, on the principles which have been now mentioned, there is no ground to presume that the revocation or renunciation of a general mandate, (neither of them being notorious,) are known to third parties; and, therefore, the contracts of such parties with a general agent will be effectual, unless it is proved that they knew, or ought to have known of the renunciation or recall³. For instance, a servant who had power to draw bills in his master's name, may bind him by bills so drawn after his dismissal, if the party taking them had not time to

¹ *Vide* *Hammond v. Barclay*, 2 East. 227, where a factor was found entitled, notwithstanding his constituent's death, to take credit in an accounting with his executors, for payments made on the faith of the mandate.

² *Scott's Trustees v. Stewart, Primrose and Co.* 17th Dec. 1814, F. C.

³ *Vide* Opinion of Buller, J., in *Salt v. Field*, 5 T. R. 215, who says, that, in such a case, the principal cannot void the *bona fide* acts of his agent, when they are against him, though he may consent to recall them when they are for his benefit.

know of it¹. The kind of intimation which is necessary to exclude this risk shall be afterwards considered with reference to the dissolution of partnership.

In the event of the mandant's supervening insanity, which is not in itself notorious, it seems to follow, from the mandant's implied contract with the public, that transactions made, even after it, with the mandatary, shall stand, unless with reference to parties who knew of the insanity². Such parties cannot be said to be *in bona fide* to contract; or rather, it may be held, that with regard to them, (as they cannot plead want of notice,) the mandant's known insanity annulled the mandatary's powers³. The same rule, under the same limitations, appears to hold with regard to all mandates, which, however limited in their terms, are acted on before the public as general mandates, the public being entitled to rely on them as general mandates till their termination is made known. It has been said⁴ that limited mandates, (which expire, in general, from the causes already mentioned, or by performance of the business for which they were granted,) "are not, like general powers, capable of extension by mere inference and *bona fides*." But the mandant, by suffering such a mandatary to act, enters into the same implied contract with the public as in a general mandate, viz. that the mandate shall continue till its termination is made known, and therefore, though it be recalled, or have ceased, all acts falling within the scope of it will be good as to third parties, unless its revocation is notorious, or has been intimated to them. The case of a limited partnership, to be

¹ *Per* Holt, C. J., in ——— v. Harrison, 12 Mod. 346. The same point was decided in an action against Sir Robert Clayton and Mr Morris, for 200 guineas, taken up in their name by a servant who had been in use to draw money for them, before his dismissal could be known. The case is stated in Beawes, No. 231, and in Molloy, B. 2, c. 10, and cited 10 Mod. 110, in Nickson v. Brohan; in which case, likewise, a master was held to be bound by the act of his servant in disposing of bills that were entrusted to him, though they had been disposed of contrary to his instructions, he being considered as having a general authority to transact for his master.

² The opinions of the Court appear to have been unanimous, at least to this extent, in Pollock v. Paterson, 10th Dec. 1811, F. C., though the case was not decided on that ground.

³ *Vide* Lord Gillies's opinion in the case of Pollock v. Paterson, note 2.

⁴ 1 Bell, 490.

afterwards noticed, which entitles third parties, after its dissolution, to rely on contracts within the scope of it, made by any one partner in the company's name, before the dissolution is made known to them, affords an illustration of this principle.

An acceptor who pays under an indorsement made by virtue of a power which turns out to be nugatory, will be liable to pay again to the party in right of the bill. But he will not be entitled to claim repetition from a *bona fide* holder who has received payment, especially if he satisfied himself as to the power under which the indorsation was made, before he paid ¹.

A person who subscribes a bill or note, will not in general bind his principal, unless he writes his principal's name *per* his procurator², or signs his name as agent for the principal³, or in some other way indicates his character of agent⁴. In

¹ *East India Company v. Tritton*, 3 B. and Cr. 280; 5 D. and R. 214.

² This mode of subscription is recommended by Lord Kenyon in *White v. Cuyler*, 6 T. R. 176. *Vide* also *Beawes*, No. 83.

³ This mode of signature was held sufficient when adopted by one partner in subscribing a submission for another, in *Wilks and another v. Back*, 2 East. 142. *Vide* *Beawes*, No. 85.

⁴ In *Barlow v. Bishop*, 214, note 5, the indorsement of a note by a wife in her own name was found null, though it would have been held good in name of her husband. In *Cotes v. Davis*, 215, note 3, the signature of a note in the wife's name was held to bind the husband, when presumed to be done by his authority. But the ground of that decision may perhaps be doubted, for the reason already stated. There is one case, *Affleck v. Williamson*, 25th Feb. 1776, *Morr. App. to Writ*, No. 1, where a promissory-note granted by the manager of a public work to one of the workmen, in his own name, without adding *per* procurator, was held not to bind him personally, even to an onerous indorsee who lived in the neighbourhood; it being proved to be the general understanding among persons connected with the works, that such notes were granted by him as *manager*. But it may be doubted, whether such an understanding, unless brought home to the indorsee, could obviate the presumption of personal liability arising from the form of his signature. In *Young v. Smarts*, 14th Dec. 1831, 10 S. D. B. 130, where an agent granted bills in his own name for the price of wheat, though he indicated that it was bought for a friend, and retained his constituents' funds to retire the bills, the Court refused to make the constituents liable for the price, on his becoming bankrupt in their debt, holding that the sellers had relied on his credit alone. In *Mason v. Rumsey senior and junior*, 1 Camp. 384, it was held, that, when a bill was addressed to a company consisting of T. Rumsey senior and junior, an acceptance by the former in his own name was an acceptance by the company; it being presumed

this case, his principal and not he will be bound¹, unless he has acted without powers, in which case he will be personally liable². If he subscribes his name, without adding words which either express or imply that he acts merely as agent, he will be personally liable³; but, if he has indorsed a bill

that he meant to accept in the terms in which the bill was drawn. But should it not rather have followed, that his acceptance, being contrary to the terms of the bill, was null? Could summary diligence have been issued on such an acceptance against the partners of the company?

¹ In *Rankine v. Mollison*, 17th Feb. 1738, *Morr.* 4064, it was found that an agreement of sale made by a person *factorio nomine*, bound only his constituent, not himself. In *Gibson v. Leith*, 2d Jan. 1711, *Morr.* 10087, it was found, that a person who had bought a ship for others, though in his own name, was only liable as their factor, and was entitled, on offering one of his constituents a vendition, to charge him on a bill which he had granted for the price, (payable on his getting a vendition,) although the ship had been damaged in the meantime. In *Ferrier v. The British Linen Company*, 20th Nov. 1807, *Morr. App. v. Bank*, No. 1, the bank was found entitled to compensate a debt due by them, by certain bills discounted by one of their agents in the country, (although he was likewise responsible for the bill to them); it being held, notwithstanding, that all such bills must be considered as discounted for the bank.

² This has been decided in a recent case, *Polhill v. Walter*, 3 B. and Ad. 114, in which a party who had accepted a bill for another, without authority, but in the belief that the acceptance would be ratified, was, on the principal being absolved from all claim, held liable for the amount of the bill, and costs of the action against the principal. He at first got a verdict; but the Court of King's Bench, after full argument, made the rule for a new trial absolute.

³ In *Ainslie v. Arbuthnot*, 6th June, 13th July 1739, *Morr.* 4064, *Elchies*, No. 20, *v. Bill*, 1 *Stewart and Craigie's Appeal Cases*, 340, the Court recognised this principle, holding, at first, that a factor who took bills from his constituent's debtor in his own name, undertook the risk of them, and afterwards altering the judgment solely in consequence of entries in a bill-book, which were held to prove that the bills had been taken for the constituent's behoof. The House of Lords, accounting the bill-book insufficient evidence, returned to the first judgment. In *Connell v. M'Lelland*, 5th July 1782, *Morr.* 1485, a factor was found liable in a bill for the price of goods bought by him for his constituent, as the bill was drawn in his own name. In *Baines v. Turnbull*, 1st Dec. 1795, *Morr.* 1485, a factor having lodged the price of goods sold for his constituents in his own account with his bankers, from whom he took bills which he indorsed to his constituents, he was found liable to them personally, though he had no commission *del credere*, 1st, Because the money was held to be lodged in the bank at his risk; and, 2dly, From his indorsing the bills. This last circumstance, accompanied with the correspondence and other facts of the case, was held by several of the Judges to prove that the money was at the factor's risk; 1 *Bell*, 379, note 4. In *Scott v. M'Kenzie*, 15th Jan. 1795, *Morr.* 10101, factors selling goods on a commission *del credere*, having sent to their employer bills drawn on a London house by a private bank, and indorsed

individually, in order to get it discounted for behoof of his principal, he will be entitled to indemnity from his principal¹. It has been said, that an agent contracting for Government is exempted from personal liability, and this is the case with

by them to him, were found liable for the amount, not so much, it is said, on the ground of their indorsing the bills, (except as that shewed that they held themselves bound,) as because they should have transmitted the money, for which they were responsible by the nature of the commission, through a public bank. Their indorsement appears in itself to have been a sufficient ground. The judgment was affirmed on appeal, 6 Brow. Parl. Cas. 289. The last of these grounds of decision was also adopted in *Selwyn v. Arbuthnot*, 18th June 1730, *Morr. 10094*, where a factor, who had remitted his constituent's money to London by a bill on a private bank, (though they ordered him to send it by a bill on the Bank of England,) was found to have thereby taken on himself the loss which arose by the bill having been taken out of the Post-office, and the money drawn for it from the bank on a false indorsation and receipt. As to the effect of an indorsement by the agent personally, *vide also* *Beawes*, No. 97. In *Wright v. Crawford*, 27th June 1821, 1 Shaw, 89, where a factor was held to have violated an essential condition which he was to observe in making sales, the Court not only found him responsible on that ground, for the price, (the buyer having failed,) but, as he had indorsed the bills for the price in his own name, they sustained summary diligence upon the bills against him.

The same doctrine has been recognised in England. In *Thomas v. Bishop*, *Rep. Temp. Hardw. 3, 2 Str. 955*, a servant of the York-Buildings Company having accepted a bill for them in his own name, was found personally liable for it to an indorsee, though the letter of advice, (of which the indorsee was held to know nothing,) shewed that it was drawn on the company's account, and though it was desired in the letter to be placed to their account. In *Lefevre v. Lloyd*, 5 Taunt. 749, 1 Marsh. 318, a broker who sold some goods for the plaintiffs having drawn a bill in their favour for the price, in his own name, was found liable to them as drawer, though he pleaded that he had acted merely as their agent. In *Goupy v. Harden*, 7 Taunt. 159, 2 Marsh. 454, Holt, 342, a London house, who acted (not under a commission *del credere*) for a house in Paris, having, by their directions, sent them bills on Lisbon, in which they were themselves the payees and indorsers, was found liable in payment as indorsers, as they had not added the words, "without recourse," to their indorsement. The same principle, as to an agent's liability, was recognised in *Appleton v. Binka*, 5 East. 147, which, however, does not relate to a bill or note; and in *De Gaillon v. L'Aigle*, 1 B. and P. 368, it was farther laid down, that a person acting as agent for an individual residing abroad was personally liable. *Vide also* *Burrell v. Jones*, 3 B. and A. 47, where the solicitors for certain assignees were, on similar grounds, found personally liable. In *Leadbetter v. Farrow*, *Mich. 1816*, Bayley, 69, an agent at Hexham for the Durham Bank was found personally liable for a bill drawn by him in his own name, though the bill directed the sum to be placed to the bank account, and though he alleged that the plaintiff knew him to be acting only as an agent.

¹ *Robinson ex parte*, *Buck. B. C. 113*.

furnishings made to him, or bills or notes which he subscribes, avowedly in his public character ¹. But it has been decided, that, if he subscribes a bill individually, though in a public transaction, he will be personally liable for payment ². In England, it has been decided, that commissioners under an act of Parliament are personally liable to the banker appointed by the act, for drafts bearing to be made by them on the public account, though these drafts are directed to be placed to their account as commissioners ³. In the same manner, executors granting as such, promissory-notes, which bind them to pay a certain sum with interest, (the stipulation of interest implying a bargain for forbearance,) were found personally liable, in respect they were held to have thereby admitted funds ⁴; and it has been likewise held, that they would be personally liable by indorsing a bill or note ⁵. In neither of these cases can the parties be free from personal liability, except by engaging to pay solely to the amount of the fund entrusted to them ⁶. A bill or note drawn or accepted in this manner would not resemble those subscribed by parties in their own name, and yet made payable only from a particular fund; for these documents are not consistent with the nature of bills, as they profess to bind the parties personally, and yet make the obligation conditional. On the other hand, in the case now supposed, the obligation, so far as it goes, is absolute, and its effect is restricted, only from the limited nature of the character in which it is contracted. In the case of a bill, such an acceptance, even supposing it to be

¹ *Macbeath v. Haldimand*, 1 T. R. 172; *Unwin v. Wolseley*, id. 674; *Myrtle v. Beaver*, 1 East. 135; *Rice v. Chute*, id. 579; *Prosser v. Allan*, 1 Gow, 117. All these were actions for the price of furnishings made to public officers in their public character, and therefore they were found not personally liable.

² In *Douglas v. Earl of Dunmore*, 27th Nov. 1800, *Morr. App. v. Bill*, 15, this was found in an action of recourse, brought against his Lordship on a bill drawn by him on the Treasurer, in his character of Governor of the Bahama Islands. The Treasury ultimately paid the principal sum in the bill, and therefore the discussion was confined to a claim of interest.

³ *Eaton v. Bell*, 5 Barnew and Ald. 34.

⁴ *Childs v. Monins and Bowles*, 2 Brod. and Bingh. 460. *Vide also Robertson v. Fauntleroy*, 8 Moore, 10.

⁵ *Per Buller, J.*, in *King v. Thom*, 1 T. R. 487.

⁶ *Per Dallas, C. J.*, in *Childs v. Monins and Bowles*, 263, note 2.

conditional, would be valid; since, as will afterwards appear¹, there is no objection to conditional acceptance, if the terms of the bill itself are absolute.

For the reasons which have been stated² with regard to the case of a husband acquiring bills or notes vested in his wife before marriage, it seems doubtful whether the executor of a person deceased could protest such bills or notes in his own name, to the effect of raising summary diligence, though he may do so to the effect of preserving recourse, and of founding a claim in an ordinary action. But, if such bills or notes have been protested by the creditor during his life, a confirmed executor may, on producing his confirmation, get the instrument of protest registered, under the act 1693, c. 15, so as to raise summary diligence thereon, as the original creditor might have done while alive.

When an agent indorses bills in his own name to his correspondent, in whose hands they remain, he must bear the risk of them, though purchased with the price of goods consigned to him, and though they have been sent to his correspondent for the purpose of being given to the consigner³. So, if he places his constituent's money with his banker in his own name, he must bear the loss arising from the banker's failure, the money being considered as his⁴. On the other hand, when a bill is taken by an agent in his principal's name, the risk and profit accrue to the principal⁵.

The duties incumbent on an agent who is employed to ne-

¹ *Post*, Chap. on Acceptance.

² *Ante*, 244.

³ *Burman's Assignees v. Grouing and others*, 1 Stark. 391.

⁴ *Wren v. Kirkton*, 11 Ves. 382.

⁵ In *Henderson's Executors v. Blackburn*, 3 Camp. 43, a shipmaster was held, *per* Lord Ellenborough, liable to his owner for the profit made, through the state of exchange on a bill which he had drawn, from the Cape of Good Hope, on London, on the ship's account, no regard being had to an alleged contrary usage. On the same principle, in *Thomson v. Havelack*, 1 Camp. 527, the owner of a ship freighted by Government was found by Lord Ellenborough alone entitled to the whole money agreed to be given for it, though part of it had been stipulated to the captain as a reward for his personal exertions; it being held, that as he was the owner's servant, he could not let his services for hire to a third party.

gotiate or get payment of bills shall be considered under the head of negotiation and payment.

We have hitherto supposed, that there is only one drawer, acceptor, or indorser of a bill or note. Let us now consider the case of several individuals becoming bound together in these different characters respectively; 1st, When they are not partners in trade; and, 2dly, When they are partners.

1. It has been shewn¹, that when several persons, though not partners, subscribe a bill or note together as drawers, acceptors, or indorsers, they are liable *singuli in solidum*, whether the words "conjunctly and severally" are used in the document or not. A note subscribed by two parties, though using the words, "*I promise*," has been found good against both, without a new stamp, if it was agreed that they should both sign; the word "*I*," being held applicable to each of them severally². The signature, however, of a note by one of two parties, as an individual, whether the two are in partnership or not, will not subject the other party in an action on the note, though it should have been granted as a security for a joint debt³. When a bill or note is payable to several persons not in partnership, it cannot be transferred with-

¹ *Antea*, 75

² *Clark v. Blackstock*, Holt, 474, *per* Bayley, J. In *Lord Galway v. Matthew*, 1 Camp. 402, Lord Ellenborough held, that a note bearing the words, "*I promise*," and subscribed for "*J. Matthew, J. Whitsmith, and J. Smith-son, J. Matthew*," would be binding, not on Matthew alone, but on all the three partners. The action failed on another ground, to be noticed afterwards. In *March v. Ward, Peake*, 129, Lord Kenyon held, that a note signed by two parties, though bearing only the words, "*I promise*," &c. was good against both. In *Hall v. Smith*, 2 D. and R. 584, 1 B. and Cr. 407, where a note was thus signed, "*For W. Smith, W. P. Smith and W. R. Taylor, W. Smith*," W. Smith was held by the Court of K. B. to be liable severally for the note. He and the other two parties were partners, as bankers, at the time of his signing. It was not decided that they would have been *severally* liable, by his signing for them; but it was held that he, at all events, having signed for himself, must be severally liable.

³ *Siffkin v. Walker*, 2 Camp. 308. The same doctrine was admitted in *Emly v. Lye*, 15 East. 7, where there was a partnership, in so far as regarded the action on the bill, although a claim was also attempted under the count of money had and received to the company's use.

out an indorsement by them all¹. It may be even doubted whether the debtor is bound to pay, except on a demand by them all, or whether action or diligence can proceed against him, except in their joint names². If any of them refuses to concur in necessary measures, the remedy appears to be an action by the others against him. If, indeed, the bill or note should be made payable to both of them, "conjunctly and severally;" or, as these words have been interpreted³, "to them or either of them," either of them may take payment, on giving up the bill discharged. But no such power seems to exist otherwise. A bill is binding on none as drawers but those who sign it⁴, and, when drawn on several individuals not in partnership, and not accepted by more than one, it is

¹ *Carwick v. Vickery*, 2 Dougl. 653. In this case, it was ultimately decided, by the usage of merchants, as proved on the trial, that when a father and son both drew a bill payable "to our order," and the son alone indorsed it, the indorsement was bad, though the Court of K. B. at first held, that by using the words "to our order," they had made themselves partners as to this transaction. A contrary doctrine appears, at first sight, to have been held in Scotland, in *Robertson v. Forbes*, 17th Jan. 1685, Morr. 14674, where, according to Fountainhall, it was decided, that two payees of a bill were *correi credendi*, and that payment to one liberated the debtor for the whole, reserving to the other payee his recourse against the co-creditor. But the report by Harcarse bears, that the Court held the sum in the bill to belong to the payees equally, so that neither of them could indorse the whole sum, but *only the half*. But the right to transfer and to receive payment of bills appears to rest on the same footing. Now, as a bill or note forms one entire obligation, it appears not capable of being either transferred or discharged without the signature of all the obligees. Each of them may, according to Harcarse, have an equal interest *inter se*; but the debtor is not, therefore, obliged to consent that an obligation, which is indivisible, should be divided by separate discharges or indorsements from each. He seems entitled to refuse payment till he gets full possession of the bill, and a discharge from every person entitled to sue on it. Their remedy, if any of them refuses to concur in a discharge, or an action for payment, appears to be by an action against him for his concurrence, and for the damage arising from his refusal. In *Lyon and Spynie v. Ardoch*, 15th Dec. 1744, Morr. 14676, two of three payees in a bill, although the third refused his concurrence, obtained decree against the acceptor for the full sum. But the acceptor knew that the sum in the bill had been borrowed by them all jointly; so that they were found entitled, in a question with him, to sue singly for its amount, in order to relieve them from this loan, for the whole of which each of them was liable.

² *Vide* note 1.

³ *Forbes*, 119.

⁴ *Hunter ex parte*, 2 Rose, B. C. 363.

binding only on the acceptor¹, though the drawer should be factor for all the drawees².

2. PARTNERSHIP implies a general mandate to each partner, to bind the company and individual partners, by subscribing for them any obligation which comes within the ordinary course of their business³. Any partner, therefore, may bind the company to third parties by signing bills or notes in their name, whether for the price of furnishings, for money advanced in the course of business, or otherwise within the limits of their trade⁴; and that, though the company contract should prohibit him from signing these documents, the public not being bound by such a prohibition, but being entitled to rely

¹ This doctrine is laid down by Molloy, 2, 10, 18; Beawes, No. 228, Marius, 64; and Buller, N. P. 270. All these authors except the case where a bill is addressed to one party, "or to another," holding that, in that case, the signature of either would be sufficient. The subscription of two parties to a note, "J. Connor, or else Henry Bond," has been found ineffectual against the latter, as importing merely a conditional obligation; ante, 24, note 2. But perhaps the same objection does not apply against a request "to one or other" of two persons to accept, because, in this case, the drawer's obligation is always absolute.

² Molloy, 2, 10, 19.

³ Erskine, iii. 3. 20. It was decided in *Lumsden v. Gordon*, Nov. 1728, *Morr.* 14567, that a partner cannot enter into a submission regarding the company's joint affairs; and in *Macalpine, Fleming and Co.*, 13th June 1791, *Morr.* 14572, the Court held that subscribing to a Canal Company did not fall within the powers of an individual partner, although they also held that the assent of the company to such subscription by him must be presumed from their subsequent acts. In *Stein v. Calder*, 2d Feb. 1794, a bill indorsed by a partner with the company's firm in a transaction out of the line of their trade was found not binding on them. *Vide* note of this case by Mr Bell, i. 402, note 8, where he also refers, on the same subject, to a case, *M'Nair v. Henderson and Co.*, 19th Jan 1803.

⁴ *Dewar v. Miller*, 14th June 1766, *Morr.* 14569. This principle is so fully settled in England as well as Scotland, that it is sufficient to refer to *Pinckney v. Hall*, 1 Salk. 126, *Lord Raym.* 175, *Smith v. Jarves*, *Lord Raym.* 1484, *Leue v. Williams*, 2 Vern. 277-92, and *Harrison v. Jackson*, 7 T. R. 207, where the general rule was admitted, though held inapplicable in the particular case. It is likewise implied in a number of later cases, to be afterwards cited, the only question in them relating to its application. It was taken for granted in a case, *Aberdeen Brewery Company v. Gray*, 1824, regarding a bill granted by one partner of a company, as *per* procurator of the company, though the other partners denied that they had empowered him to grant bills in their name. The case was held to turn solely on the question, whether the creditor in the bill knew, when he took it, that it was a fraud on the company.

on the power implied in his character of partner¹. But a partner's signature of the company firm will not be available to a party who knew that he was prohibited from signing, as the character of partner merely raises a presumption of power, which may be redargued by contrary notice². It has been held³, that a bill accepted by the secretary of a joint stock company "for the directors," did not bind the company, a special authority which he had to accept certain bills being held to be inapplicable. In another case, where four directors of a company were necessary for acting, and *three* of them had, as directors, authorised an agent to draw bills on them, which he did, and on which an action was raised against another director, as drawer, it was held, *1st*, That they were not drawers, but, in any event, were only acceptors; and, *2dly*, That there was no authority to draw, the direction to do so being given only by *three trustees*⁴. It has been held that a partner may authorise a third party to indorse bills as agent, with the company firm, so as to bind the company⁵. Any partner, though his name do not appear in the firm⁶, or any person who allows himself to be represented as a part-

¹ This doctrine is implied in the Lord Chancellor's opinion in *Ex parte Bon-bonus*, 8 Ves. 542, which *vide*. In one case, *Grant v. Hawkes* and another, 1817, Chitty, 50, note *a*, where the indorsee of a bill, accepted in name of a certain company by a partner, brought an action against the other partners; it being proved that the articles of copartnery prohibited members from circulating bills or notes in the company's name, Lord Ellenborough held that the plaintiff, in order to recover, must shew that he had given value. But in Scotland, on the principles already explained, *ante*, 87, *et seq.*, every holder is presumed to have given value, and such a presumption cannot in general be redargued except by his writ or oath.

² In *Lord Galway v. Matthew*, 10 East. 263, action against the partner of a company, on a note granted by another partner in name of all the partners, after the plaintiff had notice from the defendant that he would not pay notes signed by this party in the company's name, was refused on the ground now stated. *Vide* also *Willis v. Dyson*, 1 Stark. 164, and *Vere v. Fleming*, 1 Yo. and Jar. 227.

³ *Neale v. Turton*, 4 Bingh. 149.

⁴ *Ducarry v. Gill*, 4 C. and Ray. 121.

⁵ *Tennant v. Strachan*, 1 M. and Malk. 378.

⁶ *Swan v. Steele*, 7 East. 210, 3 Smith, 199. The same principle was recognised in *Lloyd v. Ashby*, 2 C. and Pay. 138, where one of the partners of a company in which the defendant was a sleeping partner, having accepted, in name of the company, a bill drawn by his father for a debt due by a pre-

ner¹, will be liable; but the holder of a bill is not *bound* to join a partner who was unknown to him in an action with those with whom he contracted, but may sue them alone², though he would be bound, in the ordinary case, to sue the whole. Though a bill should be drawn by a foreign house on a branch in this country, who refuse acceptance, the partners in this country will be liable individually to diligence as drawers³. It will be no defence that the partner who signed the bill or note has done so fraudulently for his own behoof⁴, or has applied

vious company, in which the defendant had no concern, Abbot, C. J., held, even in an action on the bill by an onerous indorsee, that the defendant was not bound, as the plaintiff could not have taken the bill on his credit, since he was a sleeping partner. But a rule nisi was granted on a motion for a new trial, and Abbot, C. J., in granting it, said that the question was one of great importance. The defendant treated the case of *Swan v. Steele* as merely one of transference of the company assets. But it inferred also an obligation against the sleeping partner, by virtue of the indorsement made under the company's firm. Afterwards, on full argument, the rule for a new trial was made absolute, the whole Court holding, that the acceptance, being under the proper designation of the new firm, bound the new partner; 2 B. and Ad. 28. *Vide* to the same effect, *Wintle v. Crowther*, 1 Cr. and Jarv. 316. A similar decision was given in *Heywood v. Watson*, 4 Bingh. 496, 1 M. and Pay. 268, where bankers who had engaged to discount bills to a partnership, on a guarantee by one of the partners for £.2000, were held entitled to recover against the other partner on a note for £.1000, granted by him to his copartner, in security of his share, and indorsed by the latter to the bankers, it being held, 1st, That there was no evidence of their knowing the purpose for which it was granted; and, 2dly, That, although they had, they were entitled to take it in payment of their advances.

¹ *Fox v. Clinton*, 6 Bingh. 791; *Doubleday v. Musckett*, 7 Bingh. 117.

² *De Montfort v. Saunders*, 1 B. and Ad. 398; *vide ex parte Hodgkinson*, 19 Ves. 291, and *ex parte Norfolk*, id. 457.

³ *Thomson v. Liddel and Co.*, 2d July 1812, F. C. This rule seems to be different from that adopted in England, where partners appear to be only jointly liable. In *Hall v. Smith*, 2 D. and R. 584, 1 B. and Cr. 407, one partner was found severally liable on a note, but only on the ground of his using the words "I promise," and subscribing his own name for himself and his partners.

⁴ This was pleaded, but without success, in *Swan v. Steele*, *ante*, 235, note 6, where the sleeping partner of a firm was found liable for the indorsement of a bill under that firm, when made on account of a debt contracted during a separate business carried on under the firm, but in which he had no interest. In *Baker v. Charleton*, Peake, 80, the member of a company was found liable for a bill granted under the firm, though he pleaded that it was granted on account of other transactions carried on under it, with which he had no concern. But if there had been two distinct companies carrying on business under the same firm, the holder of a bill or note subscribed by the firm would

the funds arising from it to his own use, if the party who deals with him knew nothing of the fraud¹. But a party privy to it cannot take benefit by the bill or note², though it will be good to a *bona fide* indorsee³. Accession to fraud will be presumed, when a person takes a bill or note, drawn or accepted by a partner under the company firm, in payment of his separate debt⁴, without informing the other

have been entitled to sue only the members of one firm, not of both; *vide* *M'Nair v. Fleming*, cited in *Montague on Partnerships*, i. 32; and of which there is a full note, 2 Bell, 672; *vide* also cases of *Lloyd v. Ashby* and others, 235, note 6. In *Johnston v. Peck*, 3 Stark. 66, where one partner, without the privity of the other, agreed to relieve a party from a bill which he had accepted at his request, and which had been indorsed to the company for a partnership debt, this agreement was held to bar the assignees of the company from suing the acceptor. Again, in *Jones v. Yates*, 9 B. and Cr. 932, where a partner indorsed bills by the company firm, in extinction of his private debt to another company, of which he was a partner, and also paid money out of the same company's funds in discharge of that debt, neither the partners of the company thus defrauded, nor their assignees in their right, were allowed to maintain trover for the bills, or assumpsit for the money thus paid. In *Vere v. Ashby*, 10 B. and Cr. 288, it was decided, on the same principle, that a sleeping partner of a concern was liable for bills granted to bankers in name of the poor, though really for other interests, the bankers not being aware of this fact. *Vide* also *Sutton v. Gregory*, Peake, Add. Cas. 150.

¹ This misapplication of funds was held by Lord Chancellor Eldon, in *ex parte Bonbonus*, 8 Ves. 540, to be no reason against subjecting the company when their firm was subscribed. *Vide* also cases in the preceding note.

² In *Arden v. Sharpe*, 2 Esp. 524, the plaintiff was found not entitled to sue the partner of a company on a bill indorsed to him by the other partner under the company firm, the indorser having told him to keep the transaction secret from his copartner, which was held sufficient to have made him aware of the fraud. *Vide* also *Wintle v. Crowther*, 1 Cr. and Jerv. 316.

³ This was admitted in *Arden v. Sharpe*, note 2, and is implied, indeed, in almost all the other cases. The mandate presumed from partnership is good to all parties ignorant of its misapplication.

⁴ On this ground principally, viz. that the bills were accepted in the creditor's favour under the company firm, for old debts due to him by the accepting partner, without the knowledge of the other partners, (though there were also other circumstances more directly indicative of fraud,) the Court of Session suspended charges on such bills, in *Blair Miller v. Douglas*, 22d Jan. 1811, F. C., and in *Kennedy and Mandatary*, 22d Dec. 1814, F. C., and passed a suspension in *Clark v. Shepherd*, 30th Nov. 1821, 1 Shaw, 179, although the letters were afterwards found orderly proceeded, on a reference to the charger's oath. A like decision was given on similar grounds in *Proudfoot v. Lindsay*, 18th Jan. 1825, 3 S. and D. 443, and also in a very circumstantial case, *Blair v. Bryson*, 11th June 1835, 13 S. D. B. 901. *Vide* also

partners. On the other hand, when a partner, who owes a separate debt, holds a bill drawn and indorsed in name of the firm, but without apparent reference to his debt, as where it is drawn for a different sum, and where the creditor does not know that his debtor drew or indorsed it, the latter may take it in satisfaction of the debt, since the debtor may have acquired it fairly by a separate transaction with the company¹. Subsequent approbation by the partners of a company will

Johnstone, Sharp and Company v. Phillippe, 24th July 1822, 1 S. App. Cas. 244.

In England, in *Sheriff v. Wilkes*, 1 East. 48, where an action was brought against a partner on a bill accepted under the company firm by two other partners, for a debt due to the plaintiff before the defendant became a partner, by a former firm to which the other partners had belonged, the Court of K. B. dismissed the action. The doctrine, that *mala fides* is presumable when a person takes a company obligation from a partner for his separate debt, is laid down by the Lord Chancellor in *ex parte Bonbonus*, 8 Ves. 542. A similar opinion as to the presumptive fraud of drawing a bill on a company, for a separate debt due to the drawer by an individual partner, even though the bill should be accepted by the company firm, was expressed by Lord Kenyon, in *Wells v. Masterman*, 2 Esp. 730. In *Green v. Deakin*, 2 Stark. 743, which was an action on a bill drawn under a company firm by one of their partners, payable to his order, and indorsed by him to the plaintiff in payment of a sum advanced to enable him to become a member of this firm, (the plaintiff knowing that he had thus drawn the bill, but not that it was done without consent of his copartners,) Lord Ellenborough held, "that one partner had no right "to bind another without his knowledge, by drawing a bill for his own private debt," and therefore non-suited the plaintiff. In *Hope v. Cust*, cited 1 East. 45, where the plaintiffs had taken from a merchant a guarantee for a separate debt of his, written with his own hand, and signed in name of a new firm which he had joined after the debt was contracted, without the knowledge of the other partners, Lord Mansfield, in directing the Jury, appeared satisfied, that the parties to the guarantee had either been guilty of fraud, or of gross negligence; and the Jury having found for the defendant, (a partner,) in an action on the guarantee, the Court affirmed their verdict. The same doctrine was assented to in *Heath v. Sanson*, 2 B. and Ad. 291. *Vide* also *Wood v. Holbeck*, Chitty, 56, note 2; *Goulding v. Davy*, id. 793, and *Stoveld v. Upperton*, id. 794.

¹ This was found by the Court of K. B., under circumstances nearly similar to those mentioned in the text, in the case of *Ridley v. Taylor*, 13 East. 175. The Court appear to have held, 1st, That the creditor was entitled to presume, under the circumstances of this case, that his debtor had got possession of this bill, with consent of his copartner, by some separate transaction; and, 2dly, That there might have been evidence to the contrary, if it had been so, but which evidence had not been adduced. In *Henderson v. Wilde*, 2 Camp. 561, where the defence against an action by the partners of a company for the price of furnishings by them to the defendant, depended on receipts for the price

give efficacy to acts of a partner, which would not otherwise have been valid¹.

When a bill is drawn by a partner, or managing director of a company, for their behoof, and indorsed by him to their actuary, who indorses it to a partner for the company, the latter cannot sue the original indorser personally on the bill, seeing it was subscribed by him for the company, or even for money recovered by him on the bill from the acceptor, that being recovered by him for the company's behoof². It has been also held that the drawer of a bill, being partner of a company, cannot sue the company as acceptors³.

In joint trade, which is a partnership for a limited purpose, the doctrine regarding the power of one partner to bind the rest appears to be that already laid down, under these exceptions, viz. 1st, That there is generally no firm in such transactions, although a partner may adopt some other mode of shewing that his obligations are contracted for the common concern, not individually; and, 2dly, That such obligations will not be effectual against the other partners, if they relate to any transaction which is not the subject of the joint adventure⁴. For instance, it has been decided that a partner of a

given by one of the partners, who, as was admitted, thereby set off his private debt to the defendant against the debt in question, Lord Ellenborough held that these receipts would be valid, if granted *bona fide* during the partnership. But the Jury found that they were fabricated after its dissolution, and therefore there was a verdict for the defendant. The opinion expressed by his Lordship probably proceeded on the ground, that the defendant might presume that the granter of the receipts was entitled to discharge the debt in question, even by setting it off against his private claim, taking the burden of accounting for it afterwards to his copartners.

¹ In *Sandilands v. Marsh*, 2 B. and A. 673, the partner of a company was held bound, on this principle, by a guarantee of the purchase of annuities made by another partner in the company's name; because, though such a transaction did not fall under the company's usual business, it had been entered in their books, so that all the partners either must or ought to have known of it. A similar decision was given, on the same ground, in the case of *Blackwood and Co. v. Bower*, 11th July 1805, and 17th June 1806, cited in 1 Bell, 402, note 8.

² *Teague v. Hubbard*, 8 B. and Cr. 345.

³ *Neale v. Turton*, 4 Bingh. 149.

⁴ In *Williams v. Thomas* and others, 6 Esp. 18, the defendants, who had become bound to guarantee the outfit of a particular ship in conjunction with the shipmaster, were found not to have made themselves liable thereby on a bill

joint stock banking company, discounting a bill as an individual, was not bound by the alleged actings of the company's agent relative to that bill, or liable to the exceptions pleadable against him ¹. But a note drawn in the same way with others which have been acknowledged as relating to the joint concern will bind all the partners, though made for the private accommodation of one partner, unless this was known to the holder ². The joint partners having no unlimited powers of binding each other with reference to the public, as in an ordinary partnership, their obligations are restricted to the purposes of the contract under which they act.

In a case ³, where two parties agreed to take a joint farm, and stipulated that certain articles on the farm should be paid for in cash, or by bills at three months, and where one of them, without the knowledge of the other, paid for the articles, partly in cash, and partly by bills at six and twelve months, accepted for himself and the other, it was decided by the Court of King's Bench, 1st, That there was no such partnership as implied a mandate to the one to accept bills for the other; and, 2^{dly}, That the circumstance of one of the parties having taken possession of the farm did not imply a homologation of the acceptances, he having been merely told that bills were granted, without hearing of their terms, and disapproving of their being granted, on the ground that the other party had got money to pay in cash. But it was held, that, though there could be no action against him on the bills, there might be an action against both parties for the debt. In another case ⁴, where the defendant was sued as partner of a mining company, for payment of a bill or note accepted for the directors, and recognised by them, it was held that there was nothing in the nature of the company, or their trade, which required or implied a power in the directors to bind the partners by accepting bills; and that, as the contract was not produced to shew such a power, the defendant could not be

drawn for the accommodation of one of them, and accepted by him on his own account. *Vide also Peele ex parte*, per Lord Eldon, 6 Ves. 604.

¹ *Downes v. M'Fie and Co.*, 12th Dec. 1829, 8 S. and D. 246.

² *Sanderson v. Brooksbank*, 4 C. and Pay. 286.

³ *Greenslade v. Dower and Colman*, 7 B. and Cr. 635; 1 M. and Ryl. 640.

⁴ *Dickinson v. Valpy*, 10 B. and Cr. 128.

liable. It was also doubted by one of the judges, whether the circumstances of the defendant getting shares, paying instalments on account of them, and signing a deed relative to the company, were sufficient to make him a partner.

It has been decided in England, that the executor of a deceased partner continuing the partnership for an infant, and signing bills in the course of it, is liable in payment, as taking the debt on himself, by professing to act for a party who could not be responsible¹. This rule would probably be followed in Scotland, where it was once decided, that a father could not engage his son, then eleven years of age, in trade, and was therefore personally liable².

A partner's subscription, in order to bind the company, must bear to be for its behoof. This may be indicated by his subscribing the firm³, or subscribing his own name "for the company," or for the partners by name⁴. But the company will not be bound by a bill or note, if they do not appear on it⁵; as, for instance, where only one of two par-

¹ Wightman v. Townroe and others, 1 M. and S. 412.

² M'Aulay v. Renny, 15th Feb. 1803, 2 Bell, 624, note 5. The same opinion was expressed on the general point by three Judges against the father, in the subsequent case of Calder v. Downie, 11th Dec. 1811, F. C. Three other Judges were of a different opinion. But the case was decided on the ground that the father had *in terminis* engaged himself, not his son, as a partner.

³ Pinkney v. Hall, 1 Lord Raym. 175.

⁴ A subscription of this kind was held sufficient in Lord Galway v. Matthew, *ante*, 235, note 2.

⁵ This principle seems to have been recognised in Le Pine and others v. Bayley, 8 T. R. 325. In Boliitho *ex parte*, 1 Buck's B. C. 100-3, where a person carrying on a concern under his own name, but in which another person was secretly a partner, drew certain bills in his own name, which the other partner indorsed, Lord Chancellor Eldon held, that such bills could not be chargeable against the partnership, but only against the individual estates of the parties, unless it was proved that the drawer had signed his name to them as representing the partnership, and unless the holders had also advanced money on the faith of the partnership, or proved that the money advanced had been applied to the company's behoof. It was held, that the bills were not drawn in the company's name, from the circumstance of the other partner having indorsed them, seeing his indorsement would have been unnecessary if they had been so drawn. In South Carolina Bank v. Case, 8 B. and Cr. 427, a company was found liable for bills signed by a partner in his own name, the bills being thus signed solely in the company's business, and it being held by the Court of K. B., that the company's business in America, where the bills in

ties signs a note, though it should be granted as a security for a joint debt¹; or where a partner signs a bill individually, even for money which is ultimately applied to the company's use²; or where a bill is drawn on two partners, and only one of them accepts³. It is the same, in this point of view, whether the bill so accepted be drawn on a private or an incorporated company⁴. In one case⁵, where a partner abroad was in the habit of raising money by authority of the company, and of drawing bills for it on them, which they generally accepted, they were held liable, for the amount of some bills so drawn, which they had not accepted; not, however, on the bills, or on the ground of their partner's individual signature, as drawer, being the signature of the firm, but as for money received for their use by their authority.

When all a company's transactions have been carried on, and their obligations signed, with the name of one partner, his signature may be considered as the company's firm, and the whole partners will probably be liable to an action on it. But as the signature affords a presumption, that only the individual partner is liable, which presumption must be redargued by proof, a bill or note thus signed does not appear to be a ground for summary diligence⁶.

There is another case, viz. where one partner in a com-

question were signed, was truly carried on under the partner's name as the company firm, and by their sanction.

¹ *Siffkin v. Walker*, 2 Camp. 398.

² *Emly v. Lye*, 15 East. 7; *Emlye ex parte*, 1 Rose, 61, and *Husbands ex parte*, 2 Gl. and Jam. 4. A similar decision was given in Scotland, in *Hogg v. Weir*, 24th June 1748, *Elchies*, No. 10, v. Society, where it was found that a company was not liable for a bill accepted by a partner in his own name, though the consideration given for it was another bill, of which the proceeds had been applied to the company's use.

³ *Marius*, 64. In *Mason v. Rumsey senior and junior*, *antea*, 227, note 4, one of two partners having accepted individually a bill addressed to the company, this was held by Lord Ellenborough to be constructively the company's acceptance. But it may be doubted, for the reasons already mentioned, whether this doctrine would be adopted in Scotland.

⁴ *Molloy*, 2, 10, 19.

⁵ *Denton v. Rodie and another*, 3 Camp. 493, *per* Lord Ellenborough.

⁶ The principles applicable to such a signature are laid down by the Lord Chancellor in *Bolitho ex parte*, and in the *South Carolina Bank v. Case*, *antea*, 241, note 5.

pany or joint adventure signs his name to a bill or note, not as the signature under which the concern is carried on, but under an agreement between him and the other partners, that this plan shall be adopted to raise money for the common behoof. In that case, the other partners would not be liable in an action on the bill or note, but they may be liable for the debt. The contraction of it is a company transaction; the funds that it produces are company funds, of which the company reap the sole benefit; and, therefore, although this should not be known to the creditor when he takes the bill, he would seem to have a good claim for the debt as a company debt, as he would have an action for the price of goods bought by their instructions and for their behoof, though ostensibly by an individual partner alone. If funds are raised, in the joint business, on bills or notes thus subscribed, it may be doubted whether the partners are not liable, though the managing partner should apply the money to his own purposes. The case differs from that of an agent raising funds on bills subscribed by himself, but which he binds himself to employ for behoof of his principal, because that is merely a private engagement to his principal, with which the creditor has no concern, and he is still *in titulo* to the fund, while the principal has only a claim for the general balance due to him on their whole transactions. In the other case, the fund raised by the bills or notes belongs, from its creation, to the company, who have right to the profit arising from it, independently of the general state of accounts between them and the partner who subscribes the bill. These remarks, however, are not made, as the grounds of a decided opinion¹. In a recent case², where the managing partner of a company had been

¹ A case like this, of money raised between two partners for partnership purposes, though on bills drawn only by one of them, is put in *ex parte Bolitho*, *antea*, 241, note 5, by the Lord Chancellor, who gives an opinion similar to that now stated.

² *Williamson v. Johnson*, 2 D. and R. 281; 1 B. and Cr. 146. The Court seems to have gone chiefly, in this case, on the partner's practice of taking the management and subscribing bills in this manner, although Holroyd, J., held the proof of this to be unnecessary. The firm was not very different from that subscribed.

in use to subscribe bills for them as “*per* procuration of Habgood and Fowler,” which firm they did not generally use, (their firm being Habgood and Company,) though it had been used by a former company to which they belonged, the Court of King’s Bench sustained action against the company on a bill thus indorsed, holding that there was proof of the firm Habgood and Fowler being used in the company transactions.

Partners cannot sue in right of a bill, if it has been granted for the company’s accommodation, and one of the partners has agreed to take it up when due ¹, or if any of them has granted an obligation to relieve the defendant (acceptor) from payment of it ². When a note was granted by certain parties, payable on demand, to the partners of a firm or order, with interest, and, on the retirement of two of the partners, was transferred, without indorsement, to the partners of the new firm, and interest allowed on it in account with them by one of the obligants, for whose behoof it had been granted, it was held available to the new firm against the whole obligants, they being all joint obligants, (though some had subscribed as sureties); and farther, it was held that the firm was not bound to appropriate funds of the principal debtor in their hands to the principal sum in the note, it being intended as a continuing security ³.

A partner having fraudulently indorsed, for a private debt, a bill belonging to him and his copartner, has been held not entitled, even jointly with his copartner, to set aside the transaction ⁴.

The representation of one firm, to which a bill had been indorsed, to a partner of another firm who had drawn it, that the bill was settled, cannot affect a third party ⁵.

Partnership, in so far as regards the individual partners, may be dissolved, 1st, By the death of one or more of the partners, unless the contrary is stipulated; a *delectus persona-*

¹ Richmond v. Hespy, 1 Stark. 202; and *vide* — v. Adams, 1 You. 117.

² Sparrow v. Chisman, 9 B. and Cr. 241.

³ Pease v. Hirst, 10 B. and Cr. 122.

⁴ Jones v. Yates, 9 B. and Cr. 538.

⁵ Featherstone v. Hunt, 1 L. J. 49; Chitty, Add. 793.

rum being implied, which excludes from the partnership the personal representatives of a deceased partner¹, although his effects and his representatives are liable for his past contractions as a partner². 2d, By the sequestration of the company, or the execution of a trust-deed for behoof of their creditors, as either of these events puts an end to the concern, and transfers the whole property to new parties ; or by the sequestration of an individual partner, which transfers his interest to a new party, who, on the principle of *delectus personæ*, cannot be substituted for him as a partner. A trust-deed for his creditors would, on this principle, have the same effect. In England, an act of bankruptcy by one of several partners cuts off his power, as an act of bankruptcy in name of the company cuts off the power even of solvent partners to indorse bills belonging to the company³. But if the company is still in trade, and a person who has become bankrupt continues ostensibly a partner, for instance, if his name remains in the firm, he may accept a bill with the firm, so as to bind them in a question with a *bona fide* indorsee⁴. In a recent Scotch case, where a partner of a company which had signed a bill, after getting his certificate under a commission of bankruptcy against him, wrote a letter to the holder of the bill, signed by the company firm, the Court refused to pass a suspension by him of a charge on the bill, without caution⁵.

Partnership ceases, 3d, By the renunciation of any one partner, which dissolves the partnership, and may be made on the shortest notice⁶, unless there is a stipulation to the contrary, subject, however, to the restriction, that he cannot take an undue advantage of the other partners by making it un-

¹ *Vide* opinion of Lord Chancellor Eldon in *Crawshay v. Maule*, 1 Wils. Ch. Cas. 192.

² *Jacomb v. Harwood*, 2 Ves. sen. 265; *Daniel v. Cross*, 3 Ves. sen. 277; *Devaynes v. Noble*, 1 Meriv. 616.

³ *Thomason v. Frere*, 10 East. 418; *Ramsbottom v. Lewis*, 1 Camp. 278.

⁴ *Lacy v. Woolcot*, 2 D. and R. 458.

⁵ *Hunter v. Evans and others*, 9th Dec. 1830, 9 S. and D. 158.

⁶ 2 Bell, 631, *per* Sir William Grant in *Featherstonehaugh v. Fenwick*, 17 Ves. jun. 298; also *per* the Lord Chancellor in *Crawshay v. Maule*, note 1.

fairly'. 4th, By the incapacity of a partner, which is variously interpreted, according to the duties that he has to perform by the contract; there being no reason to hold that every illness, which may disable him for a time, dissolves the partnership, while inveterate insanity in a partner who was, by the contract, to contribute his skill and industry, would probably do so². In these cases, the partnership is dissolved by the removal even of one partner; and any arrangement by which it may be continued under the firm is a new contract. Accordingly, when such a change takes place in a house which has a cash-credit with a bank, the bank, if it wishes to give credit to the new company, and to retain their claim against the former cautioners, must either get a renewal of their bond, or have their assent, directly or indirectly, to the new credit given³. In a case⁴, where a person, who had a claim against a company for an account, agreed, on the formation of a new company with the same partners, excepting one who had retired, to take a bill for the debt from the new company, payable at six months, the Court held that the retired partner was thereby discharged, and that the old claim was innovated by the credit to the new company. But, if a company continues to do business under its former firm, notwithstanding the removal of one or more partners, any contracts by third parties with reference to the firm, and not the individual partners; for instance, bonds for cash-credits to a public, though not a chartered, banking company, will remain entire against the subsisting company⁵. The company is new, in so far as

¹ *Marshall v. Marshall*, 26th Jan. 1815, F. C.

² *Per* Lord Chancellor Eldon in *Waters v. Taylor*, 2 Ves. and Beames, 303.

³ 1 Bell, 370. A construction founded on this principle was given to a cautionry-bond in *Simson v. Cooke*, 8 Moore, 588.

⁴ *Buchanan v. Sommerville*, 19th Feb. 1779, Morr. 3402. In a recent English case, *David v. Ellice and another*, C. and Pay. 368, 5 B. and Cr. 196, where one of the partners of a banking company, which owed the plaintiff a balance on a cash-account, had retired, and the plaintiff's balance had been transferred to the account of a new firm, he was still held to have a claim for this balance against the retired partner, though the transference of it had been notified to him, and he had not only expressed his confidence in the new firm, but had asked payment from them, and had drawn a bill on them for part of the balance. But each case of this kind must be decided on its own circumstances.

⁵ 1 Bell, 370, and 2 Bell, 636.

regards the claims of partners *inter se*. But the firm, with reference to which third parties contracted, remains the same.

There is one case¹, not falling precisely under the foregoing principles, but connected with them, where two persons, "William and George Murray," agents for a bank, had taken a bill, which, after George Murray retired, was indorsed by William, in name of the old firm, to "William Murray and Son," who then became agents. In this case, the Court, proceeding probably on the ground that the two concerns, being both agents for the bank, were truly the same, allowed the books of the former concern to be admitted against the latter, as evidence that the bill had been given for an unlawful consideration.

5th, Partnership may be dissolved, so far as the partners are concerned, on expiration of the period fixed for it by the contract.

But besides, certain steps are necessary to make the dissolution effectual against the public, so as to free the partners from debts afterwards contracted in name of the company. The mandate to each partner, which partnership implies, having been once publicly exercised by him, third parties are entitled to hold that it continues till its termination has been notified to them, or has become notorious. The effect of notoriety, in dissolution by death or sequestration, shall be afterwards considered. But with regard to other modes of dissolution, viz. by renunciation, incapacity, or the expiration of the stipulated term of copartnership, none of which are notorious, third parties must have express notice². Those who have dealt

¹ Finlayson v. Murray and Son, 27th June 1822, 1 Shaw, 531.

² Some of the remarks which have been made already, 226, with regard to the incapacity of a mandant, as affecting third parties contracting with the mandant, apply equally to the incapacity of a partner, as affecting his interest in the partnership.

The reverse of the doctrine stated in the text was once held, in *Armour v. Gibson*, 29th Nov. 1774, *Morr.* 14575, where a party, having withdrawn from a company at the end of three years, in terms of a reserved power in the contract, by a minute entered in the books, but without any other notification, was found entitled to a suspension of diligence used against him on bills granted afterwards in name of the company. But a different doctrine was held, in *Bolton v. Mana-*

with the company must receive notice, to counteract the knowledge which they have of its former state, from their own course of dealing. 1. The most obvious mode of notice is by circulars, which, according to Lord Ellenborough, it is prudent to send "to all with whom the partners had dealings¹." If a circular is put into the Post-office properly addressed, the presumption will be, as with a letter notifying the dishonour of a bill², that it reached the party to whom it was addressed, and he will be bound to prove that it did not³. 2. Such a change in the firm as must excite observation, and should lead all parties interested to inquire anew into its character and credit, will operate as sufficient notice, even with reference to previous customers, especially if it appears in documents habitually issued to customers⁴. 3. The delivery, at the house of

field, *Hunter and Co.*, 21st Nov. 1786, 2 Bell, 639, note 7, where a secret change in a partnership was held not to affect a third party, without intimation; and, in the subsequent case of *Dalglish v. Fleming*, 24th May 1791, *Morr.* 14595, it was decided that a private agreement dissolving a partnership at a certain time could not release a partner from the payment of bills, granted under the company's firm by the managing partner, after the stipulated dissolution, but before it was publicly advertised. *Vide Perring v. Hone*, 4 Bingh. 28; 12 Moore, 135.

¹ *Jenkins v. Blizard*, 1 Stark. 418. In this case, which was an action against a partner on a promissory-note, granted under the company firm, it being proved, on the one hand, that the dissolution of the company had been previously notified in the Gazette and in the Chronicle, which the plaintiffs took in, and of which the copy containing the notice was delivered at their house; and, on the other hand, it being proved, that they were customers of the house, that their pass-book of furnishings was sent to them after the notice, with the title of the company as before, and that the firm still appeared above the shop, Lord Ellenborough, (expressing the opinion cited in the text,) left the whole evidence to the Jury, who found for the plaintiff.

² *Sanderson v. Judge*, 2 H. Bl. 509; *Scott v. Lifford*, 1 Camp. 246.

³ 2 Bell, 640.

⁴ This was the opinion of the Court in *Dunbar v. Remington, Wilson and Co.* 10th March 1810, F. C., where the chief indication of a new arrangement was a change in the firm. In *Barfoot and others v. Dickenson and others*, 3 Camp. 147, where, in consequence of the partner of a banking house retiring, their printed checks had been altered by omitting his name, this change, without advertisement or circulars to customers, was held sufficient by Lord Ellenborough to affect a previous customer, and he was therefore non-suited in an action against the retired partner for a debt contracted by the house after the alteration.

a former customer, of a newspaper containing notice of dissolution, is one circumstance to prove his knowledge, though it will not *per se* be sufficient¹. Still less is a notice in the Gazette sufficient against customers². In one case, the Court of Session, without deciding on the effect of a notice in the Gazette, found that a notice in one provincial newspaper was not binding on customers³. The only general rule laid down in this case was, that there must be reasonable notice.

With regard to persons who have not dealt with the company before, there is a difference between our notions and those entertained in England. In England, there seems to be a doubt, whether notice in the Gazette is sufficient in all cases even against strangers; it being held in some cases that it is⁴, whereas, in another case, it is said to be only a circumstance to be left to the Jury from which to infer notice⁵; or that it is not to be considered as notice, but only as a *medium* of knowledge⁶. At all events, it is held that there can be no sufficient notice without either an advertisement in the Gazette⁷,

¹ This was one of the circumstances left to the Jury in *Jenkins v. Blizard*, already cited in 248, note 1.

² *Per* Lord Kenyon in *Graham v. Hope, Peake*, 154. In this case, although there had been a notice in the Gazette, yet, as the Jury held that the plaintiff, who had formerly dealt with the house, had got no special notice, they, under Lord Kenyon's direction, found for him. The same doctrine was recognised by the Court of Session in *Douglas, Wilson, &c. v. Gordon and Co.*, 24th Dec. 1814, F. C., where the pursuers, having got a letter of guarantee from the defenders for the price of a quantity of soapers' salts to be furnished to a company, and having begun the furnishing before its dissolution was notified in the Gazette, and continuing it afterwards, he was found to be warranted in doing so, and the defenders were made liable to him as guarantees for the price, as the dissolution had not been notified to the pursuers, and they were not bound to look for it in the Gazette.

³ *Sawers v. the Tradestown Victualling Society*, 24th Feb. 1815, F. C., and 2 Bell, 641, note 4.

⁴ *Per* Lord Kenyon in *Abel v. Sutton*, 3 Esp. 108. *Vide* also Lord Kenyon's opinion in *Gorham v. Thomson, Peake*, 42; *Wrightson v. Pullan*, 1 Stark. 375, Bayley, 59, where a notice in the Gazette was held sufficient to relieve a partner from a bill accepted by the partnership firm after the notice, though antedated, so as to appear to be before it.

⁵ *Per* Lord Kenyon in *Godfrey v. Turnbull and another*, 1 Esp. 171; and note to *Peake*, 155, which compare.

⁶ *Per* Lord Ellenborough in *Williams v. Keates*, 2 Stark. 290.

⁷ *Gorham v. Thomson, Peake*, 42.

or knowledge by the party. But, in Scotland, the most recent doctrine is, that persons contracting with the company for the first time are bound to inquire into its condition *at that time*, and, therefore, with regard to them, notice in a provincial newspaper was held sufficient ¹. This doctrine would seem to dispense altogether with the necessity of notice as to such parties. But this appears to be doubtful; for, supposing that they are bound to make inquiries, they will be misled by the previous state of the company, unless there is reasonable notice of its dissolution. The true doctrine, therefore, even with regard to strangers, appears to be, that there should be at least such information as may be obtained by proper inquiry. But knowledge by the parties will supersede the necessity of proving notice. Thus ², where it appeared that the plaintiff knew of the deed of dissolution, being attorney for one of the parties, though its execution was not proved, Lord Ellenborough held, in an action for payment of a bill accepted to him afterwards by the firm, that it was with him to prove that the deed of dissolution had not been executed.

It has been held in England, that no party can demand notice of the retirement of a sleeping partner, without shewing that he was known to be a partner ³. But, in Scotland, it has been held that such notice is equally necessary with regard to public and private partners ⁴.

When a partner has given due notice of his retirement, he will not be bound by subsequent obligations signed under the firm, though he has not used legal measures to prevent another partner from continuing the firm ⁵. But any act of connivance

¹ *Sawers v. Tradestown Society*, 249, note 3. *Vide* particularly Lord Robertson's opinion in that case.

² *Paterson v. Zachariah and Arnold*, 1 Stark. 71, part 2.

³ *Per* Lord Kenyon in *Evans v. Drummond*, 4 Esp. 89. *Vide* also *Carter v. Whalley*, 1 B. and Ad. 13.

⁴ *Hay v. Mair and others*, 27th Jan. 1809, F. C. *Vide* *Fox v. Clifton*, 6 Bingh. 792.

⁵ This was found in *Newsome v. Coles*, 2 Camp. 617, where the dissolution of a partnership having been notified, both in the Gazette and by circulars to customers, the defendant, (a partner,) was held by Lord Ellenborough to have no concern with the subsequent use of the firm by another partner, and was

in such a proceeding, as permitting the former sign, which contains his name as part of the firm, to remain over the door¹, or agreeing that his name should be used in a promissory-note, with the names of the other partners, will render him liable². It has been even found, that when a partner intimates the dissolution, but informs the person to whom he intimates it that his name is to remain in the firm for a time, that person will have a claim against him for a note which is granted in name of the firm, before the time expires³.

The dissolution of a company by sequestration is made public by the statutory advertisements respecting the sequestration, which must be inserted in the London and Edinburgh Gazettes.

It has been laid down⁴, that the death of a partner would probably in itself dissolve the partnership, without notice. The point does not appear to have been decided; but it is suggested by a learned author⁵, that the publication of the death in the usual way would place the knowledge of it within the reach of ordinary vigilance. Perhaps the rule with regard to a partner's death, as releasing his representatives from subsequent company obligations, should be the same which has been stated regarding the cessation of mandate by death, viz. that the death is presumed to be known to third parties, and that this presumption cannot be redargued without proving that it was not and could not be known, even by making all proper inquiries. If this is proved, the mandate implied in partnership will probably remain effectual as well as an ordinary mandate. In a case⁶, where certain partners of a company had joined in a bond for a cash-credit to the company, with two other persons not partners, the heirs of one of the partners who had died, but whose death had not

therefore found not liable for a bill accepted under it. *Vide also Wrightson v. Pullan*, 1 Stark. 375.

¹ *Williams v. Kears and Archer*, 2 Stark. 290; *Dolman v. Orchard and others*, per Abbott, C. J., 2 C. and P. 104.

² *Brown v. Leonard and Busk*, 2 Chitty's Rep. 120.

³ Per Lord Chancellor Eldon, 3 Merivale, 614.

⁴ *Ibid.*

⁵ 2 Bell, 639.

⁶ *Paterson v. Calder*, 5th July 1808, F. C.

been notified to the bank, were found liable to relieve the obligants who were not partners from the advances made by the bank on the cash-credit, even after their ancestor's death. But the obligation might perhaps be held an individual obligation, which transmitted against heirs, unless expressly recalled.

The rules already mentioned for notifying the dissolution of partnership when notice is necessary, are applicable to all concerns by which a joint credit has been raised, and likewise to the revocation of mandate, so far as notice of it is required.

The dissolution of a partnership, duly notified, terminates the implied mandate of each partner to bind the others, so that, although one partner should be authorised to recover and discharge the company's debts, he is no longer entitled to subscribe bills with the firm, so as to bind the other partners¹. Though the partners have still a joint interest in the funds, their characters are distinct, and any bill or note, to be binding against them, must be signed by them all². But it has been decided, in a case already cited³, that a bill drawn in name of a company by a partner, with a blank for the date and sum, and filled up by a clerk of the company, after this partner's death, and after the assumption of a new firm, with

¹ In *Kilgour v. Finlayson*, 223, note 3, where the ground of claim was a bill drawn, with the company firm, by the partner of a dissolved company who had the powers above mentioned, it was admitted that the bill could not bind the other partners; and the claim was rested on the ground of the proceeds having been applied to their use, which, however, was likewise unsuccessful. The same doctrine was held by Lord Kenyon regarding the indorsement of a bill made under the like circumstances, in *Abel v. Sutton*, 3 Esp. 108; and also in *Dalglish v. Sorley*, 24th May 1791, Bell's Cases, 487. *Vide* likewise *Henderson v. Wilde*, 2 Campb. 561. In another case, *King v. Smith*, 4 C. and Pay. 108, it was ruled, that one partner of a dissolved company might draw a bill on a company debtor for his debt, and that a stipulation by the partners, that the other partner should receive the company debts, was no defence against an action by him for this bill, as each partner had an implied power to recover company debts.

² *Per* Lord Kenyon in *Abel v. Sutton*, 278, note 2. *Vide* also *Dolman v. Orchard*, 104, 2 C. and P., and *Harris ex parte*, 1 Madd. 583.

³ *Per* Lord Ellenborough in *Usher v. Dauncey*, 4 Campb. 97, *ante*, 63, note 1.

a date previous to the termination of the old company, was good against its other partners in the hands of an onerous indorsee. The power conferred by the subscription of the firm to this blank instrument was justly held to emanate from the company, and not from the individual who subscribed.

CHAPTER III.

OF THE TRANSFERENCE OF BILLS AND NOTES.

BILLS and notes which are payable to the bearer, or to a certain person or bearer¹, or are blank in the creditor's name², or are blank indorsed, may be transferred by delivery, seeing any holder is entitled, by their terms, to exact payment.

The holder is, in general, entitled to make good such documents, without proving the consideration given for them³. If it is alleged that he acquired them fraudulently, this must be proved⁴. In this point our law differs from that of England, where it seems to be held, that if a bill or note has been lost or stolen, the holder must prove that he gave value for it⁵. How far the same rule holds with a party receiving such documents after the term of payment, shall be afterwards considered.

¹ *Grant v. Vaughan*, Bur. 1516; *per Eyre*, C. J., in *Gibson v. Minet*, 1 H. Bl. 405.

² *Antea*, 80-2. In *Wookey v. Poole*, 4 B. and A. 1, it was decided by the Court of King's Bench, that an Exchequer bill payable to _____ or order, being likewise declared payable to bearer by a memorandum at the foot of it, was transferable by delivery. It was assimilated in this respect to a bill of exchange.

³ *Antea*, 95, and the cases of *Lambton and Co. v. Marshall*, and *Scott and Co. v. Kilmarnock Banking Co.* there mentioned. The judgment in the first of these cases proceeds specially on the ground that the holders of the bill in question had *averred* onerosity and *bona fides*, and that no proof of the contrary had been offered; and to this judgment the Court unanimously adhered, on the ground that there is no *rei vindicatio* against onerous holders of bills and bank-notes, their onerosity being presumed, according to the principles of the first judgment, from their holding a bill blank indorsed, or from their mere possession of a bank-note.

⁴ *Vide* note 3.

⁵ *Antea*, 94, note 3, and cases there cited.

The delivery of a bill or note, as has been already seen ¹, is necessary to complete the transference, though it will be generally presumed from possession. But besides, in all bills or notes made payable to a certain individual, there must be an indorsation by the payee ², or, as already explained, his name must be subscribed on the back of it, either with or without an order of payment prefixed.

It has been held ³, that dividends from a sequestrated estate on bills or notes which have been ranked, are transmissible only by assignation, the right to them arising, not merely from the bill or note, which is alone indorsable, but from the deliverance of ranking. It is even laid down by a learned author ⁴, that assignation is the only competent mode of transmitting bills or notes after a claim has been made upon them under a sequestration, or in a ranking and sale, or multiplepounding, or even under a private trust executed by the debtor for behoof of his creditors. But, although assignation may be advisable, it does not appear that indorsement, in such cases, is ineffectual. The constitution of the debt does not appear to be altered by transference of the debtor's funds to a trustee, or by lodging a claim, so as to render it not indorsable. It is only the actual ranking which seems to constitute a new claim, and to render assignation necessary.

In an early case ⁵, where a bill contained the following clause, addressed to the acceptor, "this with their receipt," (viz. the receipt of the payees,) "shall oblige me to repay the like sum to you or your order," and the acceptor, after making payment, and getting the requisite receipt annexed to the bill, indorsed the obligation to a third party, the latter was

¹ *Antea*, 159. In *Bolton v. Puller*, 1 Bos. and Pull. 539, a bill which had been sent to a mercantile house blank indorsed was held to vest in them, though it did not reach them till after their bankruptcy, in respect that it was remitted before their bankruptcy, and that the house to which it was remitted was a creditor of the remitter. It was therefore held that it could not be recalled.

² *Per Eyre, C. J.*, in *Gibson v. Minet*, 1 H. Bl. 505, who expresses this opinion with reference to bills or notes payable to a particular person or order. In Scotland, as already shewn, 85, the same rule would apply, whether the words "to order" were added or not.

³ *Wallace, Hamilton and Co. v. Campbell*, 8th June 1821, 1 Sh. 53, F. C.

⁴ *Visé* 2 Bell, 20.

⁵ *Grierson v. The Earl of Sutherland*, 28th June 1727, *Morr.* 1447.

thereafter found entitled, as indorsee, to exact payment. This decision is said to have been given, "in respect the obligation "to repay was engrossed in the bill, and that the indorsation "implied an assignation." But such a mode of transference would not probably be now held effectual, either as an indorsement, or as an assignation.

It has been shewn¹, that bills or notes, though not indorsable in England, without the words "to order," or equivalent words, are indorsable in Scotland. Checks on bankers are indorsable both in Scotland and in England².

Any objection affecting the validity of a bill or note must nullify the indorsement, since it is accessory to the bill or note. If the nullity is apparent *ex facie*, the indorsement will not be good even as a new bill by the indorser to the indorsee, because it is only an obligation in terms of the bill or note, which, *ex concessis*, is null from its terms³. But when there is no such nullity *ex facie*, the indorsement becomes a good bill by the indorser to the indorsee.

¹ *Antea*, 85.

² *M'Gilchrist v. M'Arthur*, *antea*, 192, note 1. The same thing is implied in *Boehm v. Stirling*. 7 T. R. 430, where action was sustained on a banker's check at the instance of an indorsee against the drawer.

³ In this view, the decision in *Thoirs v. Fraser*, *antea*, 16, note 3, whereby the indorsee was denied recourse against the indorser, was correct, although the ground of nullifying the bill, viz. that it stipulated annualrent and penalty, would not probably be now sustained.

SECTION I.

Who may indorse ?

A bill or note may be indorsed by the payee, or a person to whom it has been transferred by him.

Indorsement by a person not payee is void, though his name and surname be the same with those of the payee, and though the latter be not so described, as to distinguish him¹. There is here an error in *essentialibus* of the indorsee's title. But such an indorsement affords a claim against the indorser, and against subsequent indorsers². An indorsement, forged by a party not bearing the same name with the creditor in a bill or note, cannot convey a title even to a person taking it *bona fide* and for value³, against even the drawee who signed it with this forged indorsement, because the drawee is bound to look

¹ In *Mead v. Young*, 4 T. R. 28, this was decided by the Court of K. B., in the case of a bill payable to "Henry Davis or order," but which another Henry Davis had indorsed for value to the plaintiff. The Court, (Buller, Ashurst and Grose, J., v. Lord Kenyon, C. J.,) held that evidence of this fact, which the Chief Justice had refused, was admissible, and therefore granted a new trial.

² Bayley, 134.

³ In *Borland v. Thistle Bank of Glasgow*, Feb. 1768, Morr. 877, it was decided that a bank was not liable for the value of forgeries committed in its name, and was entitled, when a forged note was presented to them, to put a mark on it, certifying the forgery, to prevent its circulation. In *Cheap v. Hanby*, cited 3 T. R. 127, one of two bills of the same set having been lost, and having got into the hands of a third party, who recovered the amount from the drawees by forging the payees' indorsement, the payees were, notwithstanding, found entitled to recover on the other bill. In *Smith v. Chester*, 1 T. R. 655, and *Forster and another v. Clements*, 2 Campb. 17, it was held indispensable for the plaintiff suing on a bill or note to prove the indorsement by the payee. In Scotland, its genuineness would have been presumed. But these decisions settle, at all events, that a forged indorsement cannot give any title. If the first indorsement was blank, as it appears to have been in these cases, a proof of its being made by any holder must have been sufficient; because, as will afterwards appear, if there is one blank indorsement, any bearer of the bill or note may delete all the subsequent indorsements, and will then have a good title by virtue of it alone. The principle of these decisions was also followed in refusing credit to bankers for payment of a bill accepted by them on the faith of a forged indorsement in the payee's name, in *Bagnall and Haud's Assignees v. Shepherd*, reported by Chitty, 287.

only at the drawer's signature, and attests only its genuineness by his signature ¹.

An indorsement by a minor, though it does not bind himself, will give a right of action against other parties to the bill or note ². An indorsement, also, by a person who has right to a bill or note *ex facie*, will give the indorsee a title to it, though the indorser has got it for a different purpose; for instance, though he should have received a bill to be discounted for another, and pays it into his own account ³, or though he should have got it to recover payment, and indorses it away for value ⁴. The same rule has been held to apply to navy bills ⁵ and Exchequer bills ⁶.

It has been already shown that indorsement establishes a presumption of the indorsee's onerosity and *bona fides*, which, in Scotland, cannot generally be redargued except by his writ or oath ⁷. It will afford a good objection, however, against his right, if it be proved by his writ or oath that he got the bill or note from the indorser with an order not to negotiate it, as he would have occasion to ask it back ⁸. The

¹ *Per* Buller, J., in *Smith v. Chester*, *antea*, 258, note 3.

² *Antea*, 204; and *vide* *Taylor v. Croker*, cited *ibid.*, note 4.

³ *Ramsbottom v. Cator*, 1 Stark. 288; but *vide* post, *Cranch v. White*, 1 Bingh. N. S. 414, where a party who had taken a bill from a person who owed a debt to his mother, and placed it to her account, and refused to give it up, on learning that his author had got it only to be discounted, was found liable to an action of trover for it. It is not easy to account for this decision, if his title was complete, and he was at first in *bona fide*.

⁴ *Collins v. Martin*, 1 Bos. and Pull. 651. A similar rule is laid down by Eyre, C. J., in *Bolton v. Puller*, 1 Bos. and Pull. 539, as likewise by the Lord Chancellor in *ex parte Pease*, 1 Rose, B. C., 238, where he holds the point to be quite settled.

⁵ *Goldsmid v. Gaden*, cited in *Collins v. Martin*, 1 Bos. and Pull. 649, where brokers advancing money on navy bills deposited with them were found entitled to make good their security on them, though the party depositing them had got them from the previous holder for a different purpose.

⁶ *Wookey v. Poole*, *antea*, 255, note 2.

⁷ *Antea*, 95, *et seq.*

⁸ *Vide* *Roberts v. Eden*, 1 Bos. and Pull. 398, where these facts appear to have been established by other evidence. In Scotland, they could not have been proved but by the holder's writ or oath. In *Bolton v. Puller*, 1 Bos. and Pull. 539, where a person had deposited bills blank indorsed with a house in Liverpool, to retire certain acceptances of his payable at a house in London, and where the Liverpool house, while they allowed the London house to debit them with these acceptances in their general account, transmitted the bills, likewise blank

same objection will apply against any person who has received a bill, as agent, for a special purpose, or against any third party who takes the bill from him, knowing the limited nature of his right¹. But, when a bill blank indorsed was deposited with the holder, as a security for bills which the latter had accepted for the indorser's accommodation, and the indorser retired these bills, but only with the proceeds of new bills which were accepted for him by the same party, the deposited bill, not being taken up, was held to be a security for these new bills, and effectual against the acceptor, though the indorser had desired the holder not to present it to the acceptor, as he was to procure a new bill in place of it, which, however, he did not². A similar decision was pronounced in Scotland³, as to the right of a party to hold for his relief a bill which had been indorsed to him, that the proceeds might be applied to the interest and expenses of a former bill, so far as he had paid interest and expenses on that bill.

The indorsee's right will not be good, if it appears *ex facie* of the bill or note that his indorser held it for another ; for instance, if it is made payable to him or order " for account of " another party, or " for his use," and the indorsee, notwithstanding, takes it as a security for the payee's private debt, since he is certiorated that the payee had no right so to deposit it⁴. It has been decided, however, that, according to the usage of London, the mere writing across a

indorsed, to the same account, in consequence of which they were claimed by the assignees of the London house, (though, on account of their bankruptcy, the original owner of the bills was obliged also to retire his acceptances,) the Court of C. P., while they held, on grounds stated in the case, that the London house was privy to the purpose for which the bills had been given to the Liverpool house, decided that they were applied conformably with this purpose, and that, therefore, the assignees of the London house had right to them. At the same time, they evidently held, on a ground already referred to, 259, note 4, that, if the London house had not been privy to the purpose of originally giving the bills, their right in them would have been complete by indorsation, whether the Liverpool house had applied them fairly or note.

¹ *Buchanan v. Findlay*, 9 B. and Cr. 738 ; *Kay v. Flint*, 8 Taunt. 21 ; *Flint ex parte*, 1 Swanst. 30 ; *Frere ex parte*, 1 Mont. and Mac. 263.

² *Per Best, C. J.*, in *Woodroffe v. Hayne*, 1 C. and Pay. 600.

³ *Ramsay v. Roberts*, 3d Feb. 1831, 9 S. D. 387.

⁴ *Treutell v. Brandon*, 8 Taunt. 100 ; *Sigarney v. Lloyd*, 8 B. and Cr. 226, S. C. ; in *Exchequer Chamber*, 5 Bingh. 525 ; 3 *Young and Jerv.* 221.

banker's check of the name of the banker of a party to whom or bearer the check is made payable, is not a restrictive indorsement¹. It has been also ruled, that the payee of a bill, under a restrictive title, such as has been now mentioned, might effectually discount the bill², because the money paid to him on discounting it is held to have been received for his constituent's benefit. In both these cases, the payee has the title to transfer³, and the indorsee's title derived from it, whether given as a deposit for his private debt or not, will afford a good right to *his* onerous indorsee. The first indorsee's knowledge of the purpose of depositing the bill with his indorser, if proved by his oath or writ, for instance by his books, would, according to our law, found a personal objection only against himself.

There is another question, viz. how far a restriction in the title of the holder of a bill or note can affect the right of his creditors to it, on his bankruptcy ? which shall be considered in the chapter on bankruptcy.

With regard to the transference, by a bill-broker, of bills or notes lodged with him by his customers, to third parties, for money due by, or advances made to him, it has been recently decided in England, 1st, That, according to the general law, a bill-broker, who receives a bill to be discounted, is not entitled to transfer it in a mass with other bills, in security for a previous loan, or an advance made to himself⁴. 2d, That a third party, so taking it in a mass with other bills, is barred from recovering, if he had reason to suspect that the broker was exceeding his powers in the transference, but otherwise that he has a good right⁵. 3d, That, according to the usage

¹ *Stewart v. Lee*, 1 M. and Malk. 158.

² *Evans v. Cramlington*, Carthew, 5, admitted in *Treuttell v. Barandon*, 260, note 4, where the discounting of a bill is distinguished, with reference to this point, from the deposition of it for the indorser's private debt.

³ In *Evans v. Cramlington*, note 2, the Court of King's Bench first, and afterwards the Exchequer Chamber, held that the legal title to transfer was in the payee. The legal title seems to have been also considered as in the payee in the case of *Smith v. Kendall*, 6 T. R. 124, though the note on which he sued was taken payable to him "for value received in trust for Mrs E. Thompson." His plea, which was sustained, was, that he brought the action to recover back the money for her use.

⁴ *Haynes v. Poster*, 4 Tyrwh. 65.

⁵ *Id. ibid.*

of London, it is lawful for bill-brokers to transfer bills and notes deposited with them for discount, in one mass, for advances made to them, leaving their customers to claim against them¹; and, 4^{thly}, That third parties, taking bills on the faith of such a usage, have a good claim on them².

To prevent the misapplication of securities lodged with agents, whether merchants, bankers or others, for specific purposes, an act was passed 52 Geo. III. c. 63, § 1, 2, 7 and 8, which inflicted certain penalties on such agents, 1st, When they sell, pledge, negotiate, transfer, &c. or in any manner apply to their own benefit any debenture, bill, warrant, order, state lottery-ticket or certificate, seaman's ticket, bank-receipt, bond, deed, note, or other security therein particularly mentioned, which shall be entrusted to them, without any powers to sell or pledge them, or the interest connected with them; and, 2^{dly}, When they apply to their own use any bill, note, draft, check, or order which has been deposited in their hands, with orders written and signed by the owner to invest it in the purchase of stock or in any other manner. Agents having a lien over such securities for advances, which authorises them to dispose of the securities for their indemnification, were exempted from the operation of the act, so far as the disposal of the securities might be necessary for that purpose. It was also provided, that any person offending in Scotland against this act should be punishable by fine and imprisonment, or either of them, or by transportation for any period not exceeding fourteen years, as the judge or judges before whom he is tried shall direct. But, by 7 and 8 Geo. IV. c. 27, the foresaid statute, with a number of other English penal statutes, were repealed, and, although the statute 7 and 8 Geo. IV. c. 29, sect. 49, revives its most essential enactments with reference to England, yet, as it does not extend them to Scotland, it may be doubted whether there is now any subsisting enactment on the subject relative to Scotland. No doubt, the statute which repeals the 52 Geo. III. c. 63, describes it, with the other statutes repealed, as being in force in England.

¹ Foster v. Pearson and others, 5 Tyrwh. 255.

² Id. *ibid.* In the last of these cases, some doubt appears to have been thrown on the decision in Haynes v. Foster, even as to the general illegality of a bill-broker pledging his customers' bills in mass for his own previous debt.

But, as the repeal is absolute, it seems to include the whole statute, with those clauses of it which apply to Scotland.

It has been shewn that the right of any bill or note made payable to a woman vests, on her marriage, in her husband, and that he then becomes alone entitled to indorse it¹. This doctrine, with its consequences, has been already illustrated.

The right of an executor to indorse a bill or note belonging to the deceased, and the consequences of his indorsation, as well as that of any agent, whether indorsing in his own name or merely as agent, have been formerly explained². We have also considered the rights of several parties to whom a bill or note is taken payable to transfer it, both when they are, and when they are not in partnership³.

¹ *Antea*, 213-4.

² *Antea*, 219 and 230.

³ *Antea*, 232, *et seq.*

SECTION II.

Time and Mode of Indorsation.

1. Time.

If an indorsation is dated, the date will, as already laid down¹, be probative. If it is not dated, its date will be presumed to be that of the bill². A bill may be indorsed before or after acceptance, and even while it is blank in every thing but the drawer and indorser's name³. The rules as to the proper date of bills or notes which have been signed while blank, or filled up only with the dates of drawing and indorsing, have been already explained⁴.

A bill or note may be indorsed either before or after the term of payment⁵. An indorsement after the term of payment has been assimilated to the drawing of a new bill payable at sight⁶. A bill may be indorsed after it is protested for non-acceptance or non-payment⁷; and, although it has been said that bills or notes cannot be indorsed after the protest is recorded⁸, or summary diligence raised on it, yet the contrary is now established, the rule being that the bill or note may be still indorsed, but that the protest, with the de-

¹ *Antea*, 60.² *Antea*, 60-5.³ *Antea*, 62.⁴ *Antea*, 62, *et seq.*

⁵ In Scotland, this is settled by a number of cases. It is necessary only to refer to *Elliot v. M'Kay*, 16th July 1777, *Morr.* 1648, where the bill had been indorsed nearly two years after the term of payment,—*Robertson v. M'Glashan*, 6th Feb. 1787, *Morr.* 11129, where it had been indorsed about five years after the term of payment,—and *Crawford v. Robertson's Trustees*, 30th June 1814, *F. C.*, where it had been indorsed more than two years after the term of payment. In England, it was held to be settled in *Mutford v. Walcot*, 1 *Raym.* 574, where *Holt, C. J.*, lays down the doctrine as supported by the general opinion of merchants and custom; and in *Dehers v. Heriot*, 1 *Show.* 163, and *Boehm v. Stirling*, 7 *T. R.* 430, the same thing is implied. There is an exception with regard to notes for any sum exceeding 20s., and under £.5, which, in England, cannot be indorsed or negotiated after the term of payment. 17 *Geo. III. c. 30*, § 1, made perpetual by 27 *Geo. III. c. 16*.

⁶ *Dehers v. Heriot*, 1 *Show.* 164.

⁷ *M'Adam v. M'William*, 14th June 1787, *Morr.* 1613, where this was one of the points decided.

⁸ *Bankt. i.* 13, 17; *Ersk. iii.* 2, 31.

cree of registration, or diligence following on it, is not transferred without assignation ¹.

In a case ², where the indorsee of a bill received payment from the drawer, who again sold it to a third party, and then got the indorsee to assign the diligence previously raised by him upon it, these two questions were raised, viz. 1st, Whether this indorsee could validly assign, after his right in the bill was extinguished by payment? and, 2dly, Whether, at all events, there ought not, in terms of the stamp-laws, to have been first one assignation by him to the drawer, and then another by the latter to his purchaser? The case was not finally decided. But it would appear, 1st, That although the indorsee had no right, after getting payment, to enforce the diligence, he had still the formal title to the bill, and that the drawer had merely a claim against him to divest himself; and, 2dly, That it was equally competent for him to divest himself by an assignation to the drawer, or by one made, at his request, to a third party. The drawer could not assign, because he had no title to the diligence. In another case, diligence, having been raised by the payee of a note against the granter, was afterwards carried on in his name, and sustained for behoof of a cautioner who had paid its amount, though the latter had no assignation ³.

Bills or notes, when paid by the acceptor, whether before or after the term of payment, are *functæ officio*, and cannot be re-issued, even to a *bona fide* onerous indorsee ⁴, excepting

¹ In *M'Leod v. Gordon*, 20th June 1724, *Morr.* 1558, the Court refused to sustain action by the indorsee against the indorser of a bill which had been indorsed after diligence was used upon it, not on that ground, but on the ground that the indorsee had not followed out his diligence, or intimated that he could not recover payment. In *Freer v. Richardson and Co.*, 18th June 1806, *Morr. App. to Bill*, No. 19, and *Mr Bell's note*, vol. ii. p. 19, the Court decided that the indorsation of a bill made after the protest on it had been registered, and horning raised on it, though there was no marking on the bill to shew that it had been protested, (the indorsee having taken a new protest,) was preferable to a posterior arrestment, holding, at the same time, according to *Mr Bell*, that such an indorsation conveyed only the bill, and that the protest and decree of registration could not be transferred without assignation. There is a decision, briefly reported, to the same effect by Lord Monboddo, _____ v. _____, 28th Nov. 1754, 5 *Brown's Suppl.* 820.

² *Oliver v. Haliburton*, 22d June 1822, 1 *Shaw*, 519.

³ *M'Kechnie v. M'Farlane*, 13th Dec. 1831, 10 *S. D. B.* 126.

⁴ 55 *Geo. III. c.* 184, § 19. *Vide* *Holroyd v. Whitehead*, 1 *Marsh.* 128; also *Campbell v. Lawrie and others*, 14th Jan. 1830, 8 *S. and D. B.* 310.

notes payable to the bearer on demand, for any sum not exceeding £.100, which may be re-issued after payment, if duly stamped at first¹. But a bill or note retired by another person than the acceptor, before it becomes due, and indorsed before that time to an onerous and *bona fide* holder, without a marking on it to indicate payment, has been found to afford a good claim to the indorsee². In Scotland, as will be afterwards shewn, the indorsee would have a good claim, though the bill or note had been thus indorsed after the term of payment.

It has been held, that the drawer of a bill payable to his own order, or to the payee or indorsee of any bill or note, after indorsing it to a third party, may re-acquire it after paying it, by having his own and all the subsequent indorsements scored out, and may either use diligence or action on it against the previous parties, or indorse it to a third party, who will have the same right³. This doctrine, indeed, appeared at one time

¹ Ibid. 55 Geo. III. c. 184, § 14, *antea*, 40.

² Burridge v. Manners, 3 Campb. 194.

³ In the case of Fairholmes, Petitioners, 7th Jan. 1752, Morr. 1475, where a bill, which had been protested against the drawer and other parties by an indorsee, was returned by him to the previous indorser with his indorsation scored, and he re-indorsed it to a third party, this last party was found entitled to have a protest at his own instance recorded, on producing the letter of advice from the former indorsee. But it is said to have been stated from the Bench, that such a thing had been allowed in other cases, without producing a letter of advice. In Hamilton v. Dalrymple, 31st Jan. 1724, Morr. 1403, an intermediate indorsee of a bill was found to be sufficiently re-invested with it by scoring two indorsations posterior to that in his own favour, without taking a re-indorsation from the last indorsee. It is implied, that being thus re-invested with the bill, he might have re-indorsed it. The same doctrine is also implied in several cases reported by Elchies. In the case of Crawford, 13th Jan. 1736, Elchies, v. Bill, Nos. 9 and 10, where a bill, after being protested against drawer, acceptor, and indorsers, had been paid by a third party *supra* protest, but without an indorsation, for the honour of the second indorser, the latter was allowed to have registration and summary diligence, without a new assignation to him of the bill and protest. In Straiton v. Scott, 16th Dec. 1743, Elchies, v. Bill, No. 33, a bill, after going through the hands of several indorsers, having been paid by a person for the honour of the first indorsee, who repaid him, this indorsee was found entitled, after scoring out the subsequent indorsations, to have summary diligence at his own instance. This decision seems directly to have involved the principle in question. In Robertson v. Haliburton, and in another case, both cited by Elchies, No. 35, v. Bill, where a bill had been accepted *supra* protest for the honour of the original payee, and was afterwards indorsed several times, diligence was allowed in name of the acceptor and the payee against the drawer, but not against the subsequent indorsers.

to have been shaken by an opinion said to have been expressed by the Court of Session in a recent case, "that the mere "scoring of indorsations, without any evidence of an intention to reconvey, is not sufficient to re-invest the indorser¹." But that opinion was not necessary to decide the particular case, since in it the bill was paid by one of the indorsers, as appeared from a receipt on the back of it in his favour, and the drawer, therefore, could not re-acquire it simply by scoring the indorsations, as the receipt rendered it no longer negotiable. The opinion was farther stated by the Court to have been incorrectly reported, in alluding to it in a subsequent decision², which was given in terms of the rule as now explained.

A bill, it has been said, "is negotiable *ad infinitum*, until "it has been paid or discharged on behalf of the acceptor³." But this rule is applicable only when a bill or note has been paid by the payee or an indorsee; for, if a bill drawn payable to a third party should be returned to the drawer on his paying it, it is extinguished as to the payee and all subse-

In England, the same doctrine was first held by Holt, C. J., in *Dupuys v. Shepherd*, 1 Holt's Rep. 296. It was afterwards recognised in the case of *Gomezerra v. Berkeley*, 1 Wils. 46, where a note having been first indorsed by the payees to a third party, who afterwards gave it back, but took it from them again in payment of some goods, the Court, in an action by him against the maker of the note, held, that the plaintiff had no reason to suppose it was paid, but had still a claim, notwithstanding that it was taken up from him the first time. In *Callow v. Lawrence*, 3 M. and S. 97, the same point was settled, after full consideration, by the Court of K. B., who found that a bill made payable to the drawer, which had been returned on him by a posterior indorsee, and which, after all the intermediate indorsations were scored out, had been re-indorsed by him to a third party, afforded good ground of action to this indorsee against the acceptor. Lord Ellenborough held, that the drawer might himself have had a good action against the acceptor, and that he might transfer this his right to a third party by indorsement, provided he did not thereby injure the other indorsers, which was avoided by scoring their indorsations.

¹ *Russell v. Mather*, 2 S. and D. 648.

² *Adam v. Watson*, 13th Dec. 1827, 6 S. and D. 244, and F. C.

³ *Per* Lord Ellenborough in *Callow v. Lawrence*, 266, note 3. The rule, as thus laid down, was referred to and confirmed by the Court of Common Pleas, in *Hubbard v. Jackson*, 4 Bingh. 390, 1 M. and Pay. 142, 2 C. and Pay. 134, where the drawer and payee of a bill, who had been obliged to pay it, having indorsed it a year and a half afterwards to a third party, the latter was found entitled to sue on it against the acceptor.

quent parties, and no claim remains but the drawer's right of relief against the acceptor, which cannot be transferred by indorsation¹. If the drawer is also payee, he may negotiate it after getting it back, like another payee. Nor does there appear to be any reason why the drawer, though not payee, should not acquire the bill by indorsement from a party vested with it, so as to convey it to third parties by his right as indorsee². But he could not maintain action on an indorsement in his favour, except against the acceptor; because, though he recovered from an indorsee, the latter might recover back from him in his character of drawer, and therefore the maxim would be applicable, *Frustra petis quod mox es restituturus*. On this principle it has been decided, that the payee and indorser of a note having got it indorsed to him by his indorsee, could not maintain action against the latter on the indorsement, since the defender might have sued him again for recourse as indorsee³. Nor could his indorsee sue as such unless against the acceptor; or, if his author's first signature was in the character of indorser, then against the parties whose names were prior to that signature, since his character of drawer or indorser is apparent *ex facie* of the bill or

¹ Beck v. Robley, 1 H. Bl. 89, note a, per Lord Mansfield, cited also in Callow v. Lawrence, 266, note 3.

² This seems to have been taken for granted in the King v. Burn, 5 Price, 179. The case itself depended on specialties. In Louviere v. Lambray, 10 Mod. Rep. 37, the Court of Queen's Bench decided, that the drawer of a bill might maintain action, as indorsee against the acceptor; holding, however, that it would be a good defence against such an action that the acceptor had not effects of the drawer in his hands.

³ Bishop v. Hayward, 4 T. R. 470. In Britten and Wilson v. Webb, 2 B. and Cr. 483, where the payees and first indorsers of a bill brought an action on it against a subsequent indorser, on the allegation, that the defendant had indorsed the bill to give it credit, and that therefore the plaintiffs were entitled to recover from them, as the acceptors had not paid it, the Court of K. B. held, 1st, That the defendant could not be liable to the plaintiffs on the bill; because, though he paid it to him, he would be entitled, under the same document, to recover back its amount from him as a prior indorser; and, 2dly, That he could not recover under the alleged agreement; because, according to Bayley, J., being a verbal one, it could not be set up against a written contract, besides another ground, peculiar to the law of England, that there had been no consideration for it. Vide also Carr v. Stephens, 9 B. and Cr. 758. A similar decision was given by the Court of Session in a late case, Dickie v. Gutzmer, 27th Feb. 1828, 6 S. and D. 637.

note, and therefore any person deriving right from him is held to be acquainted with it.

After part of a bill or note has been paid, it may be indorsed for the residue ¹. But there cannot be two indorsements for distinct portions of the sum in a bill or note, as the acceptor is not bound to allow two separate actions on the same contract ², unless he has accepted after such divided indorsements; in which case, it is said, that he undertakes to pay the bill agreeably to them ³. But the drawer and indorsers previous to his acceptance will not be so bound by it. It may be doubted, whether these divided indorsements, as they form distinct obligations, can be valid in terms of the stamp acts, if written only on one stamp.

2. Mode of indorsement.

No form of words is necessary to an indorsement; the indorser's signature is generally sufficient ⁴, to which his residence ought to be added, if he is not generally known in the commercial world. His signature on the face of a bill or note will be as good an indorsement as on the back of it ⁵. But a private mark or number, without the indorser's signature, will

¹ This doctrine was recognised in *Hawkins v. Cardy*, 1 Raym. 360, though held inapplicable to the particular case.

² In *Hawkins v. Cardy*, note 1, the declaration was held to be bad on this ground, as it claimed part of a bill, without stating that the rest had been paid, in consequence of which, the defendant might have been liable to a separate action for it likewise. The same doctrine was laid down in *Hawkins v. Gardner*, 12 Mod. Rep. 213; as also in *Johnson v. Kennion*, 2 Wils. 262; (*vide* opinion of Gould, J.,) although the report of that case, so far as it regards its particular circumstances, is said to be inaccurate by Wilson, J., in *Bacon v. Searles*, 1 H. Bl. 88. In this last case, the indorsee of a bill who had got payment of part from the drawer, was found entitled to recover only the balance from the acceptor, though he urged that there could not be more than one action on the bill, and that, therefore, he was entitled to sue for the whole, as trustee in part for the drawee. *Vide* also *Kyd*, 109.

³ *Beawes*, No. 266, *Chitty*, 262.

⁴ *Pinkney v. Hall*, 1 Raym. 176; *East v. Essington*, 2 Raym. 811; *Lambert v. Oakes*, 12 Mod. 244.

⁵ In *Yarborough v. The Bank of England*, 16 East. 12, Lord Ellenborough refers to the case of *Rex v. Bigg*, 1 Str. 17-18, where a person being charged with having erased the indorsement on a note, was found guilty, although the words erased were on the *face* of the note, they being held, notwithstanding, to have the legal effect of an indorsement. As the converse of this decision, we may notice *Don v. Watt*, 26th May 1812, F. C., where the Court of Session found a party liable as *joint obligant* with his son in a promissory-note, though

not be a good indorsement¹. An indorsement in pencil is effectual². It has been decided, even in England, that a mere promise by a party to indorse a bill not then in existence, will not give validity to an indorsement in his name when not written by him³. Whether a promise, to indorse an existing bill or note, would be considered in England to be an indorsement, at least with reference to the party making the promise, as such a promise to accept is held to be an acceptance, does not appear certain. But, in Scotland⁴, nothing short of the indorser's signature on the bill or note could be received as an indorsement.

When a person indorses a bill or note as agent for another, this should be expressed, either by signing "*per procuration*," or otherwise. It has been shewn⁵, that an agent who indorses bills or notes will be personally liable, unless he indorses expressly as agent. The usual mode of doing this, is to indorse "*without recourse*," by which any claim against him is excluded. But, though the indorsement is absolute, the immediate indorsee will have no claim against the indorser, if he has taken the bill under an agreement not to make a claim⁶. In Scotland, such an agreement could not be proved but by the indorsee's writ or oath.

An indorsement, when it mentions the indorsee's name, is a full indorsement, and otherwise, is called a blank indorsement. It was held, at one time, in England, that the right under a blank indorsement was not complete till the holder filled it up with an order to pay the contents to himself⁷, and that till then, he could only sue in the indorser's name. But it is now

his name was written on the back of it. He could not be considered as an indorser, because the note was not payable to him. A similar decision was given on the same grounds, in the case of *Walters*, 7th March 1818, F. C.

¹ In *Fenn v. Harrison*, 3 T. R. 760, it was held not sufficient to subject a person as indorser of a bill, that his number was on it, although he was made liable on other grounds. The same doctrine is implied in two cases cited, in *ex parte Shuttleworth*, 3 Ves. 368.

² *Geary v. Physic*, 5 B. and Cr. 234; 7 D. and R. 653.

³ *Moxon v. Pullers*, 4 Campb. 51-2, *per* Lord Ellenborough.

⁴ *Antea*, 43, *et seq.*

⁵ *Antea*, 228.

⁶ *Pike v. Street*, 4 M. and Malk. 226.

⁷ In *Clark v. Pigot*, 12 Mod. Rep. 192, Holt, C. J., on the grounds stated in the text, sustained an action on a bill by an indorsee, after he had indorsed it blank to a third party. *Vide* also other cases cited on this subject by Chitty, 255, note e.

settled, that such an indorsement makes a bill or note payable to the bearer ¹. If the payee indorses a bill or note blank, and the subsequent indorsements on it are special, any holder, though he has no right under them, may delete them, and sue the payee, drawer, and acceptor, under the payee's blank indorsement. For this indorsement, while blank, is a warrant to pay to the bearer, and no subsequent indorsements, which are only additional obligations, can restrict its efficacy, this being done only by filling it up as a special indorsement ². Any other blank indorsement, by a party in right to a bill or note, will give the holder a similar claim against the indorser and all the previous parties.

The holder of a bill or note under a blank indorsement may fill up the indorsement as he pleases, either with a special indorsement, or a discharge to the debtor ³. It may likewise be filled up in favour of any number of parties who choose to sue on it together, though they should not be in partnership; or they may sue upon it as holders, without a special indorsement ⁴.

¹ In *Peacock v. Rhodes*, Dougl. 611-33, it was decided, after full consideration, that the plaintiff having given value for a bill blank indorsed, which had been stolen from a former holder, and had been indorsed to the plaintiff for value by a third person, was entitled to recover on it against the drawer, on the drawee refusing acceptance. *Vide* also opinion of Buller, J., as to the effect of a blank indorsement, cited in *Newsome v. Thornton*, 6 East. 21-2. In Scotland, on the principles already explained, it would have been *presumed*, that the holder had given value; *antea*, 94, *et seq.* Reference is made, in *Peacock v. Rhodes*, to a previous case, *Francis v. Mott*, before Lord Mansfield, where the doctrine established in that case had been admitted.

² This point was decided in an action against the acceptor, in *Smith v. Clarke, Peake*, 225, Esp. 180. The same point was implied in *Chaters v. Bell*, 4 Esp. 210, where, in an action by the indorsee of a bill against his indorser, a declaration was sustained, which merely stated an indorsement by the payee to the defendant, and by him to the plaintiff, though there were several other indorsements between that of the payee and of the defendant; it being thus held sufficient to declare on the payee's (blank) indorsement, as the ground of the defendant's right, and on his indorsement as the ground of the plaintiff's right. The other indorsements were accounted surplusage. In *Critchlow v. Parry*, 2 Camp. 182, it was pleaded successfully, that an indorsement formed a new contract between the indorser and the indorsee, insomuch, that the latter, in an action against the former, was not required to prove even the payee's indorsement, in order to establish a title through him, as he must have done (in England) in an action against the acceptor.

³ Selwyn's N. P. 345, 5th edit.

⁴ In *Ord and others v. Portal*, 3 Campb. 239, where the parties, assignees of a bankrupt to whom a bill had been given blank indorsed, in payment of a debt,

But in a case where a bill had been given to a company blank indorsed, and two partners of the company afterwards brought an action on it, with a third party who was not a partner, it was held that this third party could have no title, unless the company had indorsed, or, at least, had delivered the bill to him ¹. In Scotland, such delivery would probably have been presumed, and the bill, being blank indorsed, would have been thus held to pass without a new indorsement. A person filling up a blank indorsement does not thereby become liable for the bill or note, unless his name be on it, because the words filled up relate only to the indorser's signature ². It has been said, that while an indorsement remains blank, an action may be still brought on the bill or note in name of the indorser; and the reason assigned is, that the holder may fill up the indorsement with an acquittance to the debtor, thus making his discharge proceed from the indorser ³. This doctrine, however, cannot be maintained without holding, that, till the blank is filled up, action can proceed only in name of the indorser, which, accordingly, was the old doctrine ⁴. But, now that any holder is entitled to sue under the blank indorsement as a conveyance to the bearer, it seems to follow, that the indorser is thenceforth divested, and can have no title to sue, although the debtor will be discharged by filling up his blank indorsement with a receipt for the contents of the bill or note, as the indorser is the last person in right of it *ex facie*. In Scotland, summary

sued the acceptor, Lord Ellenborough sustained their title; holding, that "the indorsement in blank conveys a joint right of action to as many as agree in suing upon the bill." A similar decision was given by Lord Ellenborough in *Rordanz* and another *v. Leach*, 1 Stark. 446, and by Best, C. J., in *Low v. Copestake*, 3 C. and Pay. 300, where three parties, not partners, who had indorsed a bill separately, had it in equal shares, and then struck out their several indorsements, and sued the previous indorser on his blank indorsement. *Vide* also *Attwood and others v. Rottenbury*, 6 Moore, 579.

¹ *Macell and others v. Kinnear*, 1 Stark. 499.

² In *Vincent v. Horlock and others*, 1 Camph. 442, Lord Ellenborough nonsuited the plaintiff, on this ground, in an action brought against a company as indorsers of a bill, in respect that one of their partners had filled up a blank indorsement with the plaintiff's name. The doctrine in the text was also laid down by the Lord Chancellor in *ex parte Isbister*, 1 Rose's Bank. Cas. 20.

³ *Selwyn's N. P.* 345, 5th edition, founded on *Clark v. Pigott*, 12 Mod. R. 193.

⁴ Laid down in *Clark v. Pigott*, 270, note 7.

diligence on bills or notes is authorised *against* all indorsers, without distinguishing whether their indorsements are blank or not¹, which excludes the supposition of diligence proceeding in their names.

Such being the effect of a blank indorsement, it is often advisable to fill it up, so as to prevent payment from being received by a stranger, if the document is lost or stolen². This is done by prefixing to the indorser's signature the words "Pay to Mr A. B. or order," or "Pay to Mr A. B.," the words "or order" in an indorsement not being required, even in England, to render the bill or note indorsable, provided it has been granted at first to the payee "or order"³. In Scotland, it has been shewn that these words are not necessary in any case⁴. A full indorsement prevents the bill or note from being indorsed by any but the indorsee⁵. The indorsement of any other person conveys no right to the bill or note, though it will afford a claim against himself, as a new drawer⁶. A special indorsee does not transfer the bill or note by merely delivering it, without indorsing his name, although, when it has been so delivered for value, the holder may insist that it should be indorsed. In England, such an indorsement is good, though made after the indorser has committed an act of bankruptcy; or, if not made till his assignees have taken up the estate, they will be ordained to make it, as they hold the estate subject to all equitable claims, connected

¹ 1681, c. 20; 12 Geo. III, c. 72.

² Beawes, No. 178.

³ *Moore v. Manning*, Comyn's Reports, 311, cited also in Selwyn's N. P. 346. In *Acheson v. Fountain*, 1 Str. 557, where a bill was declared on as indorsed to a certain person "or order," and turned out to be indorsed to her without the words "or order," the Court held the indorsement to be the same in legal effect as if it had these words, and therefore sustained the declaration. The same point was decided on full consideration by Lord Mansfield and the Court of King's Bench in *Edie v. The East India Company*, 2 Burr. 1216, the Court founding on the two preceding cases as settling the law.

⁴ *Antea*, 85.

⁵ This doctrine is implied in *Mead v. Young*, cited *antea*, 81, note 4, as also in *Potts v. Read*, 6 Esp. 57, and in the cases cited note 3.

⁶ *Per* Lord Mansfield in *Heylin v. Adamson*, 2 Burr. 669. *Vide* also *Penny v. Innes*, 5 Tyrwh. 107, where it was held that a party indorsing a bill immediately after certain special indorsees, without a previous indorsation by them, made himself liable to them as a new drawer, though no new stamp was necessary.

with it which could be enforced against the bankrupt¹. Such an indorsement would probably be also sustained in Scotland, though made within sixty days of the indorser's bankruptcy, and the trustee under his sequestration be ordained to make it². In a Scotch case³, where a debtor in a note delivered to his creditor, unindorsed, an accepted draft by him, on a company of which he was a partner, and with which he had not settled accounts, it was decided that the holder of the draft must recover from the company to the full amount of his note. But it is remarked by a learned author, that, as the draft was held merely in pledge, without a title to sue on it, the holder should have recovered on it only as his author could have done, viz. in so far as the latter was creditor of the acceptors.

The creditor in a bill or note may make a restrictive indorsement, *e. g.* by indorsing it to a certain person for his use⁴, which will not only prevent the indorsee, in general, from indorsing, but will make him the indorser's mandatary, whose mandate can be recalled at pleasure⁵. It would ap-

¹ *Smith v. Pickering*, Peake, 50, Anon. 1 Campb. 49; *Greening ex parte*, 13 Vesey, 206; *Mowbray ex parte*, 2 Jacob and Walker, 428. In this last case, it was declared that the assignees should not be personally liable as indorsers. *Vide* also other cases referred to by Chitty, 228.

² *Vide* Chap. on Bankruptcy.

³ *Hogg v. Muir*, Wood and Co., 18th May 1820, 2 Bell, 23, note 1.

⁴ *Per* Lord Hardwicke in *Snee v. Prescott*, 1 Atk. 249.

⁵ Pothier, Nos. 89-90. This opinion is not disputed, as Chitty supposes, 259, by Beawes, No. 219. What that author disputes is the doctrine laid down by Marius, 72, that a bill or note made payable *without restriction* to a certain person is a mere mandate, which may be recalled by the drawer even after acceptance. This doctrine was negatived with regard to indorsation, in a case cited by Forbes, 42, *Hume v. Hamilton*, 24th July 1691. Pothier's doctrine, that an indorsement, in the terms mentioned above, amounts to a revocable mandate, involves no inconvenience to third parties, since the words that are inserted prevent the bill from being indorsed, a *delectus personarum* being understood in favour of the mandatary, or, according to the same author, though the words "or order" should be added to the indorsement, the indorsee must understand that he likewise is merely the indorser's mandatary. In confirmation of this doctrine, in *Lloyd v. Sigourney*, 5 Bing. 525, and 3 Y. and Jerv. 221, an indorsement similar to that which is alluded to in *Snee v. Prescott*, note 4, was decided, by the Exchequer-Chamber, (affirming a judgment of the King's Bench,) to be a restrictive indorsement, and the words "or order," added to it, were held to mean, merely, that the indorsee might employ a third party to draw money for him, though still for the indorsee's use. In *Wedlake v. Hurley*,

pear, however, that such an indorsee may discount the bill, since the money drawn by him on discounting it will be held to have been received for his constituent's behoof¹. He may likewise indorse the bill or note "payable to J. S. *only*," which will prevent J. S. from indorsing, or he may desire that the amount should be "credited to the account of J. S." which has been found to imply merely a personal credit in his favour, without power to indorse². An indorsement absolute in form, though for a limited purpose, will not be available to a person who takes the bill from the holder, in knowledge and in contravention of that purpose³. An indorsement which desires absolutely that payment should be made to a certain person, though stating that it was in part of a specified consideration in a deed by him to the indorsers, is not restrictive, the statement regarding the consideration being accounted surplusage⁴. An indorsement may also be conditional, so that the indorsee shall have right to payment only if the condition be performed, while, otherwise, the right will revert to the indorser⁵. The constitution of a bill or

1 Cr. and Jerv. Ex. 83, it was held that the indorsement of a note to bankers, directing payment to them, under provision by them for a note by the indorser to a third party, which had been made payable at their house, did not give the payee a claim on them for the proceeds, he not having done any thing which implied his assent or privity to the appropriation. It was presumed that they held the money for the remitter of the note. Reference was made on this point to *Williams v. Evrett*, 14 East, 597. An instance of a bill being held not applicable to any purpose but that for which it was specially given, occurs in *Hallett v. Dewis*, 1 M. and Pay. 79.

¹ *Antea*, 261.

² This was decided in *Ancher v. The Bank of England*, 2 Dougl. 637. There seems to have been likewise another ground for deciding against the efficacy of the indorsement in that case, viz. that it was forged. This plea was disregarded, on the authority of a previous English case, *Price v. Neale*, 3 Burr. 1355, in respect that the defendants, who had discounted the bill on the forged indorsement, had been repaid for the honour of the plaintiffs, and that the money therefore could not be recovered back from them, as they were onerous indorsees. But, in Scotland, an action of repetition would probably have been allowed for this money, as it had been paid through mistake.

³ *Evans v. Kymer*, 1 B. and Ad. 528.

⁴ Decided by Lord Ellenborough in *Potts v. Read*, 6 Esp. 57. The same rule is applied in *Hausonillier v. Hartinsk*, 7 T. R. 733.

⁵ *Robertson v. Kensington and others*, 4 Taunt. 30. In this case, a bill having been indorsed payable to a person on the occurrence of a certain event, and there being also several subsequent indorsements, the acceptors, who had paid it

note cannot, as already mentioned, be made to depend on a contingency; but this rule does not apply to its transmission.

Delivery of the bill or note is necessary, as already mentioned¹, to complete the indorsee's right, and, when it has been made to an onerous and *bona fide* holder, the indorsation cannot be recalled. Till then, it is revocable². A bill delivered to a party to be discounted for the drawer cannot be retained for a debt of the acceptor³; nor can a bank agent retain bills indorsed to him specially for negotiation, on the averment of a debt to him by the drawer, or even by the indorser⁴.

It has been held, that the erasure of an indorsement or acceptance through the mistake of a third party does not release the indorser or acceptor⁵. In Scotland, he could not, in such a case, be liable to summary diligence, though he might be liable to an action. Such a claim would be sustained in England, though another indorsement, or even the acceptance of the bill turned out to be a forgery⁶; and, in particular, it has been sustained at the instance of a party who paid the forged indorsement, for the honour of the party whose name was forged⁷. But the claim is lost, if there is any undue delay in notifying the forgery to the indorser against whom the claim is made⁸.

The indorsee's right, when completed by delivery, draws back to the date of the indorsement, if it is dated, or, otherwise, to the date of the bill. In the case of a foreign bill, which is generally drawn in parts, each part should be delivered to the indorsee; otherwise those inconveniences might follow which have been explained with reference to the payee of such a bill⁹.

to a holder before the condition of the first indorsement was performed, were found liable in second payment to the first indorser.

¹ *Antea*, 256.

² This doctrine is implied in *Cox v. Tray*, 5 B. and A. 474.

³ *Haig v. Buchanan*, 20th June 1823, 2 S. and D. 412.

⁴ *Mathieson v. Anderson*, 12th June 1822, 1 S. 486.

⁵ *Wilkinson v. Johnson*, 5 D. and R. 403, 3 B. and Cr. 428; *Novelli v. Rossi*, 2 B. and Ad. 757.

⁶ *Wilkinson v. Johnson*, and *Novelli v. Rossi*, note 5.

⁷ *Wilkinson v. Johnson*, *supra*.

⁸ *Cocks v. Masterman*, 9 B. and Cr. 902; 4 M. and Ryl. 676; 1 Dans. and Lloyd, 329.

⁹ *Antea*, 73-4.

SECTION III.

Effect of Indorsement.

1st, With reference to the indorser's obligations, and the holder's claims.

It has been said that the indorser is a new drawer on the original drawee¹. He is therefore liable to be sued immediately, if the drawee refuse to accept², and is subject to the same claims of recourse as the drawer. He is also discharged, like the drawer, by the holder's failure to negotiate the bill or note³. But he cannot be liable to the acceptor, as he is proper debtor in the bill, unless when a person accepts for the indorser's honour⁴. The nature of this kind of acceptance shall be afterwards considered. On the other hand, the indorsee, if the indorsement is special, or, if it is blank, any holder of the bill or note, acquires by the indorsation, which is a transference of all claim on the document, the same right of action which the payee had on it against the acceptor and drawer, and also a right of recourse, not only against his indorser, but against every prior indorser, as being in legal effect a new drawer. The manner and order of enforcing these claims shall be discussed, in considering the negotiation of, and diligence or action upon, bills and notes.

It has been explained⁵, that no person can be liable directly on a bill or note, either as drawer, acceptor, or indorser, unless his name appears on it. He may be liable under

¹ *Per* Lord Mansfield in *Heylin v. Adamson*, 2 Burr. 669. *Vide* also *Haly v. Lane*, 2 Atk. 182; *Hill v. Lewin*, 1 Salk. 133; *Smallwood v. Vernon*, 1 Str. 478; *Ballingalls v. Gloster*, 3 East. 481. The same principle has been recognised in a number of other cases.

² This was decided by the Court of K. B. in *Ballingalls v. Gloster*, 4 Esp. 268, and 3 East. 481, expressly on the ground that an indorser was liable in all respects as a new drawer. For the drawer's liability in case of the drawee's refusal to accept, *vide* 162, *et seq.*

³ *Per* Lord Ellenborough in *Ballingalls v. Gloster*, note 1.

⁴ Both the doctrine mentioned in the text and the exception to it are very clearly explained by Pothier, No. 111-12.

⁵ *Antea*, 218.

a collateral guarantee ¹, or for repetition of money paid without consideration; for instance, if he has got £.1884, as the true amount of the bill delivered, though not indorsed by him, and the bill turns out to have been granted at first only for £.884, the figure 1 being interpolated ². Farther, if he delivers a bill or note, without indorsing it, in payment of a preceding debt, or for value at the time, as for goods sold, he will be liable for the debt, or for the consideration, if the bill or note should be dishonoured. This point has been already discussed ³. It has been also considered what is the consequence of a party taking the whole risk of a bill or note, when delivered to him ⁴. In the cases now referred to, he is liable, not on the bill or note, but on a consideration distinct from it; and, accordingly, he will be liable only to the party who gives the consideration, not to any future holder of the bill or note ⁵. In one case ⁶, the Court of Session decided, in conformity with a report from bankers, that a letter of guarantee for a bill to the original payee, given with the bill to a bank who discounted it, was effectual to them against the granter, notwithstanding a discharge by the party to whom it had been granted. But great doubts have been expressed of the soundness of this decision ⁷. The report on which it

¹ In *Morris v. Stacey*, Holt's C. N. P. 153, the defendant was found liable for a bill under a separate letter of guarantee, though his name was not on the bill.

² This point was decided in *Jones v. Ryde*, 1 Marsh. 157, 5 Taunt. 468, with regard to a navy bill; also in *Bruce v. Bruce*, 1 Marsh. 165, with regard to a victualling bill.

³ *Antea*, 163, *et seq.*

⁴ *Ibid.*

⁵ *Per* Lord Redesdale in *Barrington and Burton*, 2 Sch. and Lefr. 112. In this case, the holder of a note having, without indorsing it, granted a separate guarantee for payment of it to a subsequent holder, another holder, to whom the guarantee had not been addressed, was found not entitled to claim upon it in his own right, though he was held to have an equitable claim as coming in place of the party receiving the guarantee, in so far as the estate of the granter was, at that time, indebted to this party. This decision appears to be contrary to that pronounced by the Court of Session in the case of *Sir Wm. Forbes and Co. v. M'Nab*, note 6. *Vide* also *Harrison ex parte*, 2 Cox. 172, 2 Bro. C. C. 615; *Hustler ex parte*, 1 Gl. and Jam. 9; *Isbester ex parte*, 1 Rose, 20.

⁶ *Sir Wm. Forbes and Co. v. M'Nab*, 29th May 1816, F. C., 1 Bell, 288, note 1.

⁷ 1 Bell, 5th edition.

the fair course of trade, but subject to the risk of such exceptions. But this refers only to exceptions connected with the bill or note, not those which arise from distinct transactions, such as pleas of compensation against any of the indorsers, to which the holder of the bill or note will not be liable, though he should have known of them at the time of the indorsement¹. As his knowledge of exceptions is not necessarily contrary to the presumption of value arising from the indorsement, but is extrinsic to the bill or note, it may be proved by other evidence than his writ or oath. But it is not probable that any but written evidence of it would be admitted in Scotland.

4. Transference of funds.

Indorsement transfers the drawer's money in the drawee's hands to the amount of the bill or note to the indorsee, or to the holder, in a blank indorsement. It has been shewn², that the effect of drawing a bill is to convey these funds to the payee, and an indorsement is a transference of the payee's right. If the bill is accepted, no intimation of the indorsement to the drawee is necessary to complete the transference. By accepting, he has admitted funds of the drawer in his hands to the amount of the bill; and it has been held in England, that, after thus engaging to pay its amount to the payee or his indorsee, he cannot afterwards qualify his engagement by the condition that he shall have notice of the indorsement³. If the bill is indorsed before acceptance, the transference will be completed by its presentment to the drawee, as proved either by his acceptance, or otherwise as already explained⁴.

¹ *Vide* Stuart v. Campbell, as cited by Forbes, 162, *antea*, 283, note 3.

² *Antea*, 174.

³ This was the chief ground of decision in Reynolds v. Davies, 1 Bos. and Pull. 628, in which the rule was settled as laid down in the text. In Scotland, where the words "or order" are not necessary to make a bill indorsable, the acceptance of a bill which had them not, must have the same effect as if they were inserted.

⁴ *Antea*, 66, *et seq.* There is one case, Ewing and Geills v. Johnston, 13th July 1696, Morr. 1460, where the indorsee of an unaccepted draft is said to have been preferred, without intimation to the drawee, to a posterior arrester of the drawer's funds in the drawee's hands. One of these arresters, however, was said to be barred *personali exceptione*, as an indorser of the bill. But, at all events, this early decision cannot unsettle the doctrine established, as already shewn, with regard to the transference of the drawer's funds to the payee, whose

it, against the acceptor as debtor *ex facie* of the bill¹. But whether this doctrine applies, when the indorser knew that the acceptor signed, like himself, for accommodation, shall be afterwards considered.

It has been held in England, that a person who gets a bill or note to be discounted for a special purpose, cannot divert it from that purpose, by bringing an action on it for his own behoof², though such an objection would not be competent against his onerous indorsee. But a party cannot be allowed to plead against such an indorsee that there was fraud in the contract which gave rise to the bill, so long as he himself abides by that contract³. A person who takes a bill or note under circumstances inconsistent with his having a fair claim against the obligant on it, as for instance when he takes from a party who has committed act of bankruptcy on a bill previously signed by third parties for his accommodation⁴, cannot legally claim on it. But, if a person whose name is on a bill or note receives another bill from the real debtor to be discounted, in order to raise money to retire it, and, not getting it discounted, is obliged to pay the first bill himself, he will be entitled to sue the acceptor of the second bill for his indemnity⁵. In Scotland, no exceptions against the indorsee, which do not appear *ex facie* of the bill or note, can in general be proved otherwise than by his writ or oath. How far this doctrine is affected by the circumstance of the indorsement being dated before or after the term of payment, shall be afterwards discussed.

It has been held that the indorsee of a bill drawn for supplies made to a ship may effect an insurance on the ship to secure its payment⁶.

¹ This doctrine was implied in *Houle v. Baxter*, 3 East. 177. The application of it to the circumstances of that case turned on matters peculiar to English law, which it is not necessary to state.

² *Delaunay v. Mitchell*, 1 Stark. 439; *Hallet v. Dewis*, 1 M. and Pay. 79; *Evans v. Kymer*, 1 B. and Ad. 529. *Vide* other cases in Chitty, p. 91, note *b*, and *antea*, 260.

³ *Archer v. Bamford*, 3 Starkie, 175.

⁴ *Smith v. De Witts*, 6 D. and R. 120.

⁵ *Walsh v. Tyler*, reported by Chitty, 265, note *d*.

⁶ *Tasker v. Scott*, 6 Taunt. 234.

3. Indorsee's claim against acceptor.

The holder's claim for payment, by *virtue* of indorsation, against the acceptor, or any of the other parties, is not in general affected even by exceptions pleadable against his indorser, and this has been also held, when the holder claims, not by an express indorsement from his author, but by his transference of a blank indorsed bill, on which three indorsements later than his have been previously deleted¹. It has been even found, that a bank which acquired right to a bill that was accepted for the drawer's accommodation, by discounting it to him, was entitled to enforce payment immediately by summary diligence against the acceptor, without being obliged to assign to the acceptor, for his security, a mortgage which they had from the drawer, though the acceptor asked it only under reservation of their preference over it for their general balance². It seems to have been held in this case, that, as the acceptor was debtor *ex facie* of the bill, no extrinsic evidence of his relation to the drawer could stay the indorsee's diligence against him. Nor can an indorsee be affected by previous receipts for payments, whether partial or total, which do not appear *ex facie* of the bill or note³. In England, although this rule is not followed with regard to bills or notes indorsed after the term of payment, it has been decided, that an indorsee, before the term of payment, is not affected even by payment of

¹ Adam v. Watson, 13th Dec. 1827, 6 S. and D. 244, and F. C.

² Cowan and Sons v. Hurry and others, 19th Dec. 1816, F. C.

³ Erskine v. Thomson, 12th Dec. 1711, Morr. 1501. The Court laid down the general doctrine in this case, as stated in the text, although there was also this additional ground of decision, that the receipts in question might, from their terms, refer to other bills which had passed between the drawer of the bill, who granted them, and the acceptor. The same doctrine was held in Fairholm v. Cockburn, 24th July 1714, Morr. 1506, where reference is made to a corresponding opinion given by Forbes, 161, who likewise (60) mentions a case, Vanmuir and Allan v. Wood, 5th Feb. 1702, to the same effect, and in Barnett v. Ritchie, 12th Feb. 1778, Morr. 1519, where the holder of a bill was found entitled to this privilege of an onerous indorsee, the bill having been indorsed to him in indemnity of a debt for which he had become bound on the indorser's account, although a doquet was subjoined, binding himself to account for the proceeds to the indorser, while the latter bound himself to make good any deficiency. *Vide* also Wightman v. Johnston, 18th Jan. 1700, Forbes, 163.

is competent. In the first case on this subject ¹, the indorsee of an accepted bill was preferred to an arrestment in the acceptor's hands prior to the indorsement; but it is implied, that the indorsee would have been affected by the arrestment, if he had known of it when he took the bill, or if his right had been gratuitous, which would have made him liable to the same exceptions with his author. In another case ², an indorsee was postponed to an arrestment in the acceptor's hands, as he knew that it was used while the bill was blank in the drawer's name. But this decision proceeded on the doctrine which then prevailed, that there was no bill till the drawer's signature was filled up. The same ground of decision was adopted in a subsequent case ³. In another case ⁴, an arrestment in the hands of the purchaser of some goods for the price used by the owner's creditors, when the purchaser had accepted a bill for the price payable to a third party who acted for the owner, was preferred to arrestments by other creditors of the owner in the payee's hands. In all these cases, arrestment was sustained to attach in the acceptor's hands the debt due by him to the drawer. But, *2dly*, It was not held to prevent the transference of the debt to a third party by indorsement of the bill, though the payee might become liable in damages, if he indorsed the bill after the arrestment was intimated to him. In one case, indeed ⁵, an arrestment of the amount of a promissory-note in the granter's hands for a debt of the payee, was preferred to a blank indorsation, as the indorsation was not proved to be prior to the arrestment, and a decision to the same effect had been previously given in a similar case ⁶. But these decisions proceeded on the ground, that promissory-notes were not then entitled to the privileges of bills.

3dly, Decisions have fluctuated more regarding the effi-

¹ Smith v. Home, 5th Dec. 1712, Morr. 1502.

² M'Aul v. Logan, June 1728, Morr. 1694.

³ Nelson v. Russell, 14th Feb. 1734, Morr. 1435.

⁴ Dunlop v. Jap, 18th Jan. and 21st Feb. 1752, Morr. 741. The validity of an arrestment in the acceptor's hands was likewise taken for granted by the Bench in Haddow v. Campbell and Co, 7th Dec. 1796, Morr. 763.

⁵ More v. Paxton, 9th Dec. 1766, Morr. 12259.

⁶ Forbes v. Innes, 2d Feb. 1739, Morr. 712.

cacy of an arrestment in the indorsee's hands, when he holds the bill for the indorser's behoof, to attach his obligation of accounting to the indorser. It does not appear to have been ever held that such an arrestment could stop the transference of the bill, so as to nullify a subsequent indorsation of it by the holder to a third party; and, indeed, it has been observed on the Bench ¹, that even arrestments in the acceptor's hands might be defeated by indorsation. It would not make any difference, although the indorsee was aware of the previous arrestment. But the question in the case now alluded to was, whether it attached his obligation of accounting, so as to place the arresting creditor in right of it when the indorsee received payment of the bill. In an early case ², arrestment seems to have been held incompetent to any effect; for, although, in that case, the bills were given to the holder blank indorsed, for the purpose of being delivered by him to certain creditors of the indorser, so that there was thus a specific appropriation which excluded the arrestment, yet the Court is said to have proceeded on the general ground, that "exhibition and not arrestment was the *habile diligence* to affect bills thus deposited." In the next case ³, the Court adopted a different principle; holding, when the payee admitted that he had the bill merely as factor for the drawer, that arrestment by the drawer's creditor attached the money in his hands. But the money was not yet in his hands, as the bill was not paid; and, accordingly, it was admitted that it might have been arrested, at the same time, in the hands of the acceptor as debtor, which does not appear compatible with the holder being also debtor. As the indorser was bound, as factor, to use diligence to recover the debt, arrestment was held competent to attach his obligation of accounting. The difference between such liability to account and an actual debt, which is the only proper subject of arrestment, has been already explained ⁴. Lord Kilkerran, in reporting the case, distinguishes between it and that of a creditor to whom a bill is indorsed in security of his debt, under an obligation

¹ *Haddow v. Campbell and Co.*, 7th Dec. 1796, *Morr.* 763.

² *Jameson v. Leckie*, Dec. 1726, *Morr.* 711.

³ *Gordon's Creditors v. Innes*, 15th Jan. 1740, *Morr.* 715.

⁴ *Anteu*, 291.

[illegible][illegible]

In a later case ¹, the claim of creditors, as such, was sustained on a bill, which had been indorsed to a banker for their behoof. It does not, therefore, make any difference as to an indorsee's right, whether he holds it for himself or for others. But, in a competition between an indorsement for creditors, and the arrestment of other creditors, the arresters have been preferred, if the purpose of the indorsement was not communicated to the creditors interested in it, as it was till then merely a mandate to the indorsee, which the indorser might recall when he pleased. This was the ground of decision ², in a competition between creditors for whose behoof their debtor had remitted a sum of money to a third party, and other creditors arresting the money in his hands. A similar decision was given ³ in a competition with regard to the proceeds of a bill indorsed to a third party, for behoof of certain creditors, to whom the indorsement had not been communicated, and another creditor arresting in the indorsee's hands. The same doctrine was followed afterwards, in two similar cases ⁴. On this principle, a person thus indorsing a bill in trust for creditors, without communicating the indorsement to them, may recall the trust by implication; as by making drafts on the indorsee for other purposes. But otherwise, the creditors may prevent the trustee from retaining the deposited fund for a private debt due to him by the truster ⁵.

A holder will be liable to the same exceptions with his indorser, if the exceptions arose from a contract or transaction to which they were both privy ⁶, or if he knew that the indorser had no good right to the bill ⁷, in which case, he can make

¹ *Herries and Co. v. Crosbie*, *antea*, 283, note 2.

² *Stonehewer v. Inglis*, 21st July 1697, *Morr.* 7724.

³ *Gray v. Lord Ross*, 16th Jan. 1706, *Morr.* 7724.

⁴ *Auchterlony's Creditors*, Nov. 1732, *Kames*, R. D. 11; *Baird v. Murray's Creditors*, 4th Jan. 1744, *ibid.* 77.

⁵ *Stewart v. Bisset*, 16th Feb. 1770, *Morr.* 42, App. to Compensation.

⁶ *Boyes v. Shaw*, 5th June 1707, *Morr.* 1500; *British Linen Co. v. Suter*, 18th Nov. 1824, 3 S. and D. 294.

⁷ *Lovel v. Martin*, 4 Taunt. 799. The plaintiff in this case having lost the bill, and the defendants, (bankers,) at whose house it was made payable, having, after they knew this fact, discounted it to a third party, (the plaintiff having

no claim, though his onerous indorsee may. In a case ¹, where a company in whose favour a bill had been accepted by two persons jointly, and who had arrested the funds of one of the acceptors in security of it, knew that the other acceptor was a cautioner; this knowledge was held to excuse them from assigning the bill to a party who had another bill from the principal debtor alone, and who had used arrestments posterior to them on the funds belonging to the principal debtor. It was pleaded successfully, that, as the bill granted to the first arresters was extinguished by their preferable arrestment of funds belonging to the principal debtor, the other acceptor's obligation to them, being merely a cautionary obligation, was extinguished, and that, as they were aware of its limited nature, they could not be bound to keep it up by assigning it to a third party. In another case ², where a marking had been made on a bill, bearing that another bill had been drawn on the acceptor for the same sum, it was found, on the drawee of the second bill refusing acceptance, that the first, notwithstanding the marking, might be indorsed, so as to give the indorsee a claim against the drawee under his acceptance of it. The claim against the drawee under the first bill remained entire, on his refusing to accept the second bill, which was only a substitute for it. In a recent English case ³, it has been held that markings on a bill, indicative of some separate transaction between the previous parties to it, bind the indorsee to inquire into the particulars of the transaction, before taking the bill. But a general release by the drawer to the acceptor, before

indorsed it before he lost it,) and then given it up to the drawer, who was their customer, as a voucher for which they took credit in their account with him, it was unanimously held by the Court of Common Pleas, not only that they must lose the amount of the bill, but that they were liable in trover for it to the plaintiff. The same rule would have been applicable if the holder had indorsed the bill; for instance, if one of the indorsements had been a special one, and the fraudulent holder had indorsed it in name of the special indorsee, although there was a previous blank indorsement, under which any holder might have claimed independently of this, on scoring out the posterior indorsements.

¹ *Miller v. Baird and Gray*, 24th Nov. 1749, *Morr.* 12721.

² *Mitchell v. Brown*, 8th July 1714, *Morr.* 1467.

³ *Gascoyne v. Smith*, 1 M'L. and Yo. 348.

indorsement, does not affect the indorsee, unless he is privy to it ¹.

It has been decided in England ², that, when a bill is indorsed, after acceptance has been refused, but before the term of payment, and the indorsee, not aware of the non-acceptance, presents it again, and negotiates it duly, he will have a good claim on it against the previous parties. The bill is held, in that case, to be negotiable, as there is nothing on it which indicates its dishonour. But, if the indorser of a bill pays it, when returned to him by an indorsee unaccepted after the term of payment, but without notice of its dishonour, and takes a reindorsation, he cannot sue a previous party who has got no notice; because he was discharged by the holder's neglect to notify the dishonour, which dishonour he should have known from the bill being unaccepted after the term of payment, and can have no claim against another party who has been equally so discharged ³.

If the holder of a bill has notice of its non-acceptance at the time of taking it, which will be held to be the case if it is then noted for non-acceptance ⁴, although indorsed to him before the term of payment, his right will be restricted, even by a private agreement regarding the bill between his indorser and any previous party ⁵.

In a recent case ⁶, in Scotland, where a party had taken up a bill after it was protested, and got an assignation to the protest, the Court, proceeding partly, however, on certain written evidence which had been recovered, held that he was a mere agent for the previous holder, and was not entitled to the privileges of a *bona fide* onerous indorsee. It would appear that they decided on a similar ground lately, in passing without caution a suspension of a charge on a bill which, before coming into the charger's hands, was retired by a party for whose accommodation the suspender had subscribed it, the

¹ *Dod v. Edwards*, 2 C. and Pay. 602.

² *O'Keefe v. Dun*, 1 Marsh, 613; 6 Taunt. 305.

³ *Roscoe v. Hardy*, 12 East. 434, 2 Camp. 458.

⁴ Bayley, 163. *Per* Lord Kenyon, in *Brown v. Davis*, 3 T. R. 82.

⁵ This was one of the points decided in *Crossly v. Ham*, 13 East. 408.

⁶ *Ritchie v. M'Kay*, 29th May 1823, 2 S. and D. 349; 9th March 1826, *ibid.* 4th vol. and F. C.

payment being acknowledged by a receipt which appeared on the protest¹. There is nothing contrary to this rule in a recent case² which is noticed, lest it should be misunderstood; for, 1st, Although the bill, in that case, was protested, and diligence raised on it before the holder had got it, it is not said that these facts appeared *ex facie* of the bill, or were otherwise known to him; and, 2dly, The exception there pleaded was applicable only to the drawer and payee, and the bill, before it became due, or was dishonoured, had been conveyed onerously from him to a third party, through whom the holder derived right, so that the latter was not liable to any such exception. There is a later case³, which appears, at first sight, to involve a decision that the holder was entitled, under similar circumstances, to the privileges of an onerous indorsee. But the decision proceeded on the ground of a previous *res judicata*, and it does not appear whether the question was argued before the first decision. In another case⁴, where a bill, after being taken up by the drawer, had been delivered by him to a debtor of his, for whose accommodation it had been accepted, and by him indorsed in security of a debt to another bank, the Court, proceeding chiefly, as appears, on the ground that the Bank should have held the bill to be an extinguished document, from its being marked as previously discounted, and not being indorsed by the former discounters, decided that they could not maintain action on it as onerous holders against the acceptor. Whether the mere circumstance of its being formerly discounted precluded the pursuers *per se* from taking it as onerous indorsees may be doubted.

In general, if such exceptions come to the holder's knowledge, as prove that the bill or note is not negotiable with safety, he will be liable to the exceptions pleadable against his indorser, though unknown to him, because he takes it, not in

¹ Ramsay v. Aitken, 26th Jan. 1826, 4 S. and D. 390. *Vide* also M'Gowan v. M'Kellar, 24th Feb. 1826, 4 S. and D. 408, *per* Lord Balgray; and also for a case of real evidence of agency arising from the admitted facts of the case, Farquhar v. Sloan, 2d Dec. 1830, 9 S. D. B. 112, and 23d Jan. 1834, 12 S. D. B. 327.

² Drew v. Paterson, 2d Dec. 1825, *ibid.* 259.

³ Pattison v. Campbell, 17th Jan. 1827, 5 S. and D. 208.

⁴ Smith v. Murdoch, 28th May 1829, 7 S. and D. 670.

the fair course of trade, but subject to the risk of such exceptions. But this refers only to exceptions connected with the bill or note, not those which arise from distinct transactions, such as pleas of compensation against any of the indorsers, to which the holder of the bill or note will not be liable, though he should have known of them at the time of the indorsement¹. As his knowledge of exceptions is not necessarily contrary to the presumption of value arising from the indorsement, but is extrinsic to the bill or note, it may be proved by other evidence than his writ or oath. But it is not probable that any but written evidence of it would be admitted in Scotland.

4. Transference of funds.

Indorsement transfers the drawer's money in the drawee's hands to the amount of the bill or note to the indorsee, or to the holder, in a blank indorsement. It has been shewn², that the effect of drawing a bill is to convey these funds to the payee, and an indorsement is a transference of the payee's right. If the bill is accepted, no intimation of the indorsement to the drawee is necessary to complete the transference. By accepting, he has admitted funds of the drawer in his hands to the amount of the bill; and it has been held in England, that, after thus engaging to pay its amount to the payee or his indorsee, he cannot afterwards qualify his engagement by the condition that he shall have notice of the indorsement³. If the bill is indorsed before acceptance, the transference will be completed by its presentment to the drawee, as proved either by his acceptance, or otherwise as already explained⁴.

¹ *Vide* Stuart v. Campbell, as cited by Forbes, 162, *antea*, 283, note 3.

² *Antea*, 174.

³ This was the chief ground of decision in Reynolds v. Davies, 1 Bos. and Polh. 628, in which the rule was settled as laid down in the text. In Scotland, where the words "or order" are not necessary to make a bill indorsable, the acceptance of a bill which had them not, must have the same effect as if they were inserted.

⁴ *Antea*, 66, *et seq.* There is one case, Ewing and Geills v. Johnston, 13th July 1698, Morr. 1460, where the indorsee of an unaccepted draft is said to have been preferred, without intimation to the drawee, to a posterior arrester of the drawer's funds in the drawee's hands. One of these arresters, however, was said to be barred *personal exceptione*, as an indorser of the bill. But, at all events, this early decision cannot unsettle the doctrine established, as already shewn, with regard to the transference of the drawer's funds to the payee, whose

The effect of indorsement, in transferring the payee's right to the drawer's funds, is the same with that of drawing the bill in transferring them to the payee¹. If the bill has been accepted before it is indorsed, or the payee, before indorsement, has intimated it to the drawee by presentment or otherwise, the drawer's funds in the drawee's hands are thenceforth transferred by the bill to him *or his order*, so that an indorsement by him carries them to the indorsee without new intimation, against an intervening arrestment by the payee's creditors. The same right is carried by every new indorsement to the indorsee or holder, in preference to diligence by the payee's creditors or those of any previous indorser. Even though the holder knew of such diligence at the time of indorsement, it cannot stop the currency of the bill.

This leads to the question,

How far bills or notes are arrestable?

To understand this matter, the following distinctions must be observed :

1st, As arrestment attaches debts due to the common debtor by third parties, or his funds in their hands, it seems competent to arrest funds or debts of the drawer in the drawee's hands, whether he has accepted the bill or not. But, 2dly, Such arrestment cannot be used against the drawee, except as debtor to the drawer, his acceptance of the bill, if he has accepted, only proving that he is the drawer's debtor. Therefore, 3dly, If, after a bill is drawn upon and intimated to the drawee, the drawer's funds in his hands have been transferred by indorsement of the payee, or any subsequent holder, no arrestment by a creditor of such payee or holder, in the drawee's hands, can be preferred to the funds even over a posterior indorsement, since, by drawing the bill, these funds are made transferable by indorsation, which transferable quality no subsequent arrestment can restrain. But an arrestment in the acceptor's hands by the creditor of a drawer and

case is, in this respect, the same with that of an indorsee. Both Lord Stair, i. 11, 7, and Mr Erskine, iii. 5, 7, state generally that bills may be transmitted without intimation. But they may be understood to refer to accepted bills. Forbes states the same doctrine, 166, but he founds it entirely on the case of Forbes and Geills v. Johnston, now mentioned.

¹ *Antea*, 174, *et seq.*

indorser will be good against the indorsee, if it is proved by his oath that he holds the bill merely for the drawer's behoof'. 4thly, An arrestment in an indorsee's hands by a creditor of his indorser is inept, though the indorsee should be a mere factor for the indorser; for arrestment is effectual only against a debtor of the common debtor, and, therefore, if used even in the drawee's hands by a creditor of the holder, it might be effectual so long as the arrester's debtor remained holder, but could not prevent him from indorsing the bill. On the other hand, though an indorsee should hold the bill merely as the indorser's factor, there is no arrestable debt due by him to the indorser. The acceptor is debtor, and the indorsee's character of debtor cannot begin, nor, consequently, can it be competent to arrest in his hands till the acceptor has paid him the bill. The indorsee may, indeed, as the indorser's factor, be liable to a contingent claim of accounting; and it has been found, that the right or *nomen debiti* which he holds subject to this claim, may be assigned by a draft on him in favour of a third party¹, since every personal right is assignable. But arrestment is applicable only to debts actually due by the arrestee, or funds in his possession, not to effects which have been consigned to him, but have not yet reached him². The indorsee's liability is different from that of a trustee to whom heritable property has been conveyed in order to be sold, or of a company for an individual partner's share of profits, in the hands of which parties arrestment has been found competent by a creditor of the partner, or by any creditor of the truster³. In these cases, the funds were in the arrestee's hands, though their proceeds were not ascertained; whereas, here, the funds are not in the indorsee's hands, and he is not accountable, till he recovers them by payment from the acceptor.

These points appear to be now settled, though the decisions regarding them have not been always uniform. 1st, It has been established, that an arrestment in the acceptor's hands

¹ Cowan v. Douglas, Forbes, 164.

² M'Leod v. Crichton, *ante*, 176, note 2.

³ This was found in *Stalker v. Aiton*, 9th Feb. 1759, Morr. 745.

⁴ *Grierson v. Ramsay*, 25th Feb. 1790, Morr. 759.

is competent. In the first case on this subject ¹, the indorsee of an accepted bill was preferred to an arrestment in the acceptor's hands prior to the indorsement; but it is implied, that the indorsee would have been affected by the arrestment, if he had known of it when he took the bill, or if his right had been gratuitous, which would have made him liable to the same exceptions with his author. In another case ², an indorsee was postponed to an arrestment in the acceptor's hands, as he knew that it was used while the bill was blank in the drawer's name. But this decision proceeded on the doctrine which then prevailed, that there was no bill till the drawer's signature was filled up. The same ground of decision was adopted in a subsequent case ³. In another case ⁴, an arrestment in the hands of the purchaser of some goods for the price used by the owner's creditors, when the purchaser had accepted a bill for the price payable to a third party who acted for the owner, was preferred to arrestments by other creditors of the owner in the payee's hands. In all these cases, arrestment was sustained to attach in the acceptor's hands the debt due by him to the drawer. But, *2dly*, It was not held to prevent the transference of the debt to a third party by indorsement of the bill, though the payee might become liable in damages, if he indorsed the bill after the arrestment was intimated to him. In one case, indeed ⁵, an arrestment of the amount of a promissory-note in the granter's hands for a debt of the payee, was preferred to a blank indorsation, as the indorsation was not proved to be prior to the arrestment, and a decision to the same effect had been previously given in a similar case ⁶. But these decisions proceeded on the ground, that promissory-notes were not then entitled to the privileges of bills.

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cacy of an arrestment in the indorsee's hands, when he holds the bill for the indorser's behoof, to attach his obligation of accounting to the indorser. It does not appear to have been ever held that such an arrestment could stop the transference of the bill, so as to nullify a subsequent indorsation of it by the holder to a third party; and, indeed, it has been observed on the Bench¹, that even arrestments in the acceptor's hands might be defeated by indorsation. It would not make any difference, although the indorsee was aware of the previous arrestment. But the question in the case now alluded to was, whether it attached his obligation of accounting, so as to place the arresting creditor in right of it when the indorsee received payment of the bill. In an early case², arrestment seems to have been held incompetent to any effect; for, although, in that case, the bills were given to the holder blank indorsed, for the purpose of being delivered by him to certain creditors of the indorser, so that there was thus a specific appropriation which excluded the arrestment, yet the Court is said to have proceeded on the general ground, that "exhibition and not arrestment was the "habile diligence to affect bills thus deposited." In the next case³, the Court adopted a different principle; holding, when the payee admitted that he had the bill merely as factor for the drawer, that arrestment by the drawer's creditor attached the money in his hands. But the money was not yet in his hands, as the bill was not paid; and, accordingly, it was admitted that it might have been arrested, at the same time, in the hands of the acceptor as debtor, which does not appear compatible with the holder being also debtor. As the indorser was bound, as factor, to use diligence to recover the debt, arrestment was held competent to attach his obligation of accounting. The difference between such liability to account and an actual debt, which is the only proper subject of arrestment, has been already explained⁴. Lord Kilkerran, in reporting the case, distinguishes between it and that of a creditor to whom a bill is indorsed in security of his debt, under an obligation

¹ *Haddow v. Campbell and Co.*, 7th Dec. 1796, *Morr.* 763.

² *Jameson v. Leckie*, Dec. 1726, *Morr.* 711.

³ *Gordon's Creditors v. Innes*, 15th Jan. 1740, *Morr.* 715.

⁴ *Anteu*, 291.

to account; holding that, in the latter case, the surplus is not arrestable in the indorsee's hands, because he is not bound to use diligence in recovering the money; whereas a factor is bound to use diligence. But, if the indorsee's obligation to account is arrestable in one case, it ought, independently of the obligation to use diligence, to be equally so in the other. In another case¹, where a bill had been assigned to a third party by the payee in relief of certain engagements which the assignee had come under for him, the Court, as the report implies, held, that an arrestment in the assignee's hands was not good even for the surplus due by him, before he had recovered payment of the bill. This doctrine has been now settled, with regard to arrestment in the hands of an indorsee who is merely trustee for the indorser. In a case², where bills were taken payable to a person, that he might recover them for the drawer, arrestments in his hands by the drawer's creditors before he recovered payment were found inept; but other arrestments by the same creditors, after payment, were sustained, as there was then a debt due by him. It would appear that, in this case, the Court held a draft by the drawer of the bills on the payee, in favour of the same creditors, effectual to convey his interest in the bills to the amount of the draft, even before payment; thus finding, that a claim of accounting against the holders of an unpaid bill might be assigned, though not arrested. In a subsequent case³, where the payee had indorsed it to a third party in trust for him, the Court, after full consideration, decided that an arrestment by a creditor of the indorser in the indorsee's hands, before the latter had got payment, was inept⁴, and preferred to it a draft by the indorser on the indorsee in favour of another creditor, which had been protested for non-acceptance

¹ *Carmichael v. Moesman*, 22d June 1742, Cl. Home.

² *Pewtress and Roberts v. Thorold*, 14th July 1768, *Morr.* 756-7, and note. A similar decision is said, *F. D.* vol. iii. 41, to have been given in *Scott v. Small*, 23d June 1779.

³ *Haddow v. Campbell and Co*, 7th Dec. 1796, *Morr.* 763.

⁴ *Vide* 2 Bell, 71, note 4. The distinction already laid down, between debts or funds in possession of a trustee, which are arrestable, and those which are only recoverable, is mentioned by Mr Bell in his note of this case, as founded on by Lord Justice-Clerk Macqueen.

and non-payment after the bill was paid. In another case ¹, a person having sold certain subjects, and indorsed the bills taken by him for the price to a third party for behoof of his creditors, the Lord Ordinary sustained an arrestment by a creditor in the indorsee's hands. But the Court altered, as the funds had been conveyed in trust for all the creditors. The validity of the arrestment does not appear to have been discussed. In a subsequent case ², the Court held the incompetency of such an arrestment to be settled by the decision first referred to ³.

The doctrines now explained regarding bills seem equally applicable to promissory-notes, the payee being held as drawer of a bill payable to himself, and the granter of the note acceptor; and the question relating to arrestments, either against the acceptor as debtor, or against an indorsee for behoof of the payee, or of any other indorser.

Although no arrestment can prevent the funds in the acceptor's hands from being transferred by indorsement, a creditor of the party in right of the bill may not only arrest in the acceptor's hands, but, to prevent indorsement to a third party, he should probably raise a process of exhibition against the holder ⁴, applying, likewise, summarily to the Court, to take the document into their custody by sequestration ⁵. The acceptor will thus be interpellated from paying it, till the arrester obtains decree of forthcoming on his arrestment.

The creditor of an indorsee cannot arrest the amount of a bill or note in the hands of any parties besides the acceptor, till its dishonour has been duly notified to them; because it is only then that they become liable for payment. After this,

¹ *Sinclair v. Lochhead*, 17th Nov. 1798, *Morr. App. to Bankrupt*, No. 9, and *Sess. Papers*.

² *Dick v. Goodal and Co.*, 1st June 1815, *F. C.* Mr Bell, ii. 72, note 2, refers to another case, *Douglas, Heron and Co. v. Malcolm*, 9th Feb. 1792, where the possessor of bills arrested in his hands by a creditor of the party who had intrusted them to him, was found responsible for giving them back to his constituent. But he states that this decision proceeded on special grounds.

³ *Haddow v. Campbell and Co.*, 295, note 4.

⁴ An exhibition is the process recommended in *Jameson v. Leckie*, *antea*, 293, note 3; and in *Dick v. Goodal and Co.*, note 2.

⁵ This mode of procedure is said to have been adopted with regard to a promissory-note, in *Dalrymple v. Ross*, 18th Nov. 1737, *Morr.* 4819.

arrestment in their hands is competent, because they are then directly debtors for the amount as well as the acceptor.

5. Indorsee's presumed onerosity and *bona fides*.

The several rights belonging to the indorsee or holder of a bill or note, are founded on the presumption that he has obtained right to it *bona fide* and for value, which cannot in general be redargued unless by his writ or oath. This rule, with its modifications, has been already partly explained¹. It is only necessary to notice some other cases, applicable peculiarly to indorsees, which farther illustrate the doctrines stated. It has been held, that one of several part-owners of a ship, for whose accommodation a party had accepted a bill while in advance for them, could not claim (from the acceptor) as an onerous indorsee²; or certain members of a committee, by whose authority bills had been granted for the price of subjects purchased under a statute, and who afterwards retired the bills individually, from a bank with which they had been discounted, and charged the payees on them³; or an agent, who admitted on oath, that he had got a bill, as factor from his constituent, to discount and place the proceeds to his credit, which he had done, and afterwards retired the bill with his own funds, it being held no ground of onerosity that his employer was ultimately in his debt on the whole account⁴. Farther, when a stranger paid a note, while the granter was under diligence for it, and, having got an assignation to the diligence, charged an indorser, who alleged that he was trustee for the acceptor, a diligence was allowed to recover his books and those of the granter, in support of this averment⁵. On the other hand, it was held not to disprove onerosity, that a bill indorsed by the drawer to his law-agent, and by him to a bank, on which diligence had been raised by the bank, was found in the agent's repositories, after his death, with a re-indorsation by the bank, it being held presumable, that the agent had retired it with his own funds, and that the re-indorsation

¹ *Antea*, 94, *et seq.* on "value received."

² *Bousie v. Harvey*, 18th Feb. 1832, 10 S. D. B. 355.

³ *Campbell v. Lawrie*, 25th Nov. 1831, 10 S. D. B. 62.

⁴ *Rust v. Brand*, 12th Dec. 1834, 13 S. D. B. 193.

⁵ *Farquhar v. Sloan*, 2d Dec. 1830, 9 S. D. B. 112. Agency was afterwards held to be established by the whole circumstances of the case; 23d Jan. 1834, 12 S. D. B. 327.

was equivalent to a receipt ¹. Nor was it admitted as a ground of suspending a charge by a company for payment of a bill, that one of the partners, individually, was said to have prevented delivery of goods for which the bill was granted ². It has been also decided, that a company, one of whom was a brother of the acceptor, retiring a bill to which they were no parties, after it became due, and part had been paid by the acceptor, without an indorsation by the bank who held it, were entitled, as onerous holders, to charge the drawer ³. Allegations of fraud, or engagements inconsistent with onerosity, have been also repeatedly rejected, unless offered to be proved by the holder's writ or oath ⁴. It has been also held, that inconsistencies between a party's statements on the record, and in his judicial examination, when not on oath, do not disprove his onerosity and *bona fides* ⁵. As to the various circumstances stated on reference to oath or admitted, which confirm or disprove onerosity or *bona fides*, there can be no general rule; the cases cited below are noticed merely as illustrations ⁶.

As indorsation by way of donation has been sustained ⁷, it may probably be held that such an indorsee, though he cannot allege onerosity, should have the privileges of an indorsee, so as to be freed from the exceptions pleadable against his indorser. The presumption of value received is generally applied to indorsations, only as a test of their *bona fides*, seeing that value is most frequently given for fair indorsations, and that indorsations without value are often made collusively for behoof of the indorser. But this reasoning fails in the case of donation, when the indorsement is irrevocable. On the other hand, if a bill has been acquired fraudulently, the

¹ M'Lachlan v. Henderson, 16th June 1831, 9 S. D. B. 753.

² Lang v. Allan and Co., 27th Jan. 1831, S. D. B. 367.

³ Muir and Co. v. M'Donald, 4th March 1831, 9 S. D. B. 535.

⁴ Bell, 13th May 1831, 9 S. D. B. 567; Young v. Pollock, 25th May 1832, 9 S. D. B. 570, where the Court, after the oath had been taken, held it incompetent to contrast it with previous statements in process.

⁵ Malcolm, 30th June 1835, 13 S. D. B. 1021.

⁶ Hunter v. Ford, 2d March 1831, 9 S. D. B. 524; Cook v. Stirling and Co., 8th March 1831, 9 S. D. B. 561; Dickson v. Ker and Johnston, 21 Dec. 1830, 9 S. D. B. 125; Hunter v. George's Trustees, 24th May 1832, 10 S. D. B. 561; Morrison v. Dick, 27th Nov. 1834, 13 S. D. B. 95; M'Fie v. Kenwick, 11th July 1835, 13 S. D. B. 1119.

⁷ Barbour v. Blackwood and Hare, *ante*, 20, note 4.

holder will not be entitled to the privileges of an indorsee, though he should have paid its full amount. This doctrine seems to have been admitted ¹, where the holder of a bill, on reference to his oath, deponed, that he had given value for it. But, as onerosity only had been referred, the Court decided that the party so referring, having perilled the case on that ground, could not enter into the question of *bona fides*.

¹ *Megget v. Brown*, 14th Feb. 1827, 5 S. and D. 343.

SECTION IV.

Indorsations after the Term of Payment.

It is a question, how far an indorsee is liable to the exceptions pleadable against his indorser, from the mere circumstance of the bill or note having been indorsed to him after the term of payment? Different rules have been adopted on this subject in Scotland and in England.

1. Law of England.

In England, it has been held, that the circumstance of a bill or note being unpaid after the term of payment affixes to it such suspicion as should prevent any person from taking it without inquiry. This does not, however, appear to have been considered at first as sufficient *per se* to subject an indorsee to the exceptions pleadable against his indorser, but only as a ground, in cases of fraud by indorsers, or of exceptions against them, for leaving the case with the jury, to presume, from the slightest additional circumstance, that the indorsee was acquainted with the fraud or the exceptions¹. But it seems to be now established, that, in general, the mere circumstance of a person taking a bill or note after the term of payment, or even a banker's check long after it is issued², subjects him to the exceptions pleadable against his indorser³.

¹ This was laid down with regard to a case of fraud by the indorser, *per* Buller, J., in *Taylor v. Mather*, cited 3 T. R. 83; and the same rule appears applicable to all exceptions pleadable against an indorser. In the case of *Brown v. Davis*, 3 T. R. 82, in which the foregoing case is cited, Lord Kenyon, C. J., held, that the mere circumstance of a note being taken after the term of payment did not *per se* subject the indorsee for the indorser's fraud, though there were circumstances in the case which, in his opinion, required investigation. In the case, likewise, of *Colombies v. Slim*, Chitty, 243, note *d*, *id.* Rep. 2, 638, it was held, that an indorsee taking a note overdue after an action raised upon it, was, notwithstanding, entitled to bring a separate action, unless the previous action had been notified to him.

² *Boehm v. Stirling*, 7 T. R. 430.

³ This was the opinion expressed in *Brown v. Davis*, 3 T. R. 82, *per* Buller and Ashurst, J., *v.* Lord Kenyon, C. J. Grose, J. appears to have confined himself, in this case, to the alleged evidence of collusion betwixt the indorser

It has been held that a banker's check, issued on 16th November, and presented in payment of goods on 22d November, is overdue, as such a document is intended for immediate use, and that, therefore, the person who took it was bound to prove a good title in his author¹. But the mere circumstance of a check being six days overdue, does not make it so suspicious as to render a person who takes it, and gets it cashed for another, liable for its amount to the party from whom it was fraudulently taken, unless there are circumstances of carelessness, or suspicion in his mode of acquiring it². A bill or note, payable on demand, is not held, merely from its terms, to be overdue, unless payment has been demanded and refused³. Nor is it probable that such demand will be pleadable against the holder of the bill or note, unless it appears *ex facie* of it. It has been farther decided⁴, that a note payable on demand, *with interest till paid*, is not overdue, though 2½ years' interest appears to have been paid

and indorsee, without entering into the general doctrine now stated. The opinion expressed by Buller, J., is said to have been acted on by him at Launceston, in a case *Bankes v. Colwell*, tried before him, where he allowed a proof against the holder of a note *payable on demand*, which he had taken a year and a half after it was issued, that it had been granted originally for smuggled goods. The same doctrine was afterwards held by Lord Kenyon at Nisi Prius, in *Good v. Cuile*, cited 7 T. R. 427, as the ground for deciding a number of cases where there was no proof, but the strongest presumption of fraud, and also by his Lordship and the whole Court of King's Bench in *Boehm v. Stirling*, 7 T. R. 430, though it was found inapplicable to the particular case; as likewise in *Brown v. Turner*, 7 T. R. 630, where the rule was applied. It was further enforced by Lord Ellenborough in *Tinson v. Francis*, 1. Camp. 19, in *Thoroughgood v. Clark*, 2 Stark. 251, where a receipt by the indorser, granted before the indorsement, in full of all demands, was, on the ground now stated, found effectual to the acceptor against the indorsee; and in *Verley v. Sanders*, 2 Chitty's R. 127, where an indorsee who had taken a bill after the term of payment was found not entitled to sue the acceptor, in respect that the indorser had got it from the defendant, with reference to a hypothetical balance on accounts between them not yet settled, so that the defendant was not yet constituted *his* debtor for the sum in the bill.

¹ *Rotschild v. Corney*, 9 B. and Cr. 388.

² *Down v. Halling*, 4 B. and Cr. 330; 6 Dowl. and Ryl. 455; 2 C. and Pay. 11.

³ *Barrough v. White*, 4 B. and C. 324; 6 D. and R. 379.

⁴ *Gascoyne v. Smith*, 1 M.L. and Yo. 348, *per* Garrow, B. *Vide* also *Heywood v. Watson*, 4 Bingh. 496, and opinion of the Court in *British Linen Co. v. Mackay*, 22d Jan. 1836, F. C.

on it, because the stipulation of interest implied that it was not to be paid immediately. When a bill was indorsed a second time by the original indorser, after intermediate indorsations, it has been held that the second indorsement must have been made, after it was returned dishonoured¹. In the case of a bill indorsed for value after the term of payment, by a person who had got it to recover payment for a previous indorser, this indorser's right was held effectual against the last holder, insomuch that a new bill drawn in payment of the first, by the drawers of that bill, when payment was demanded from them, was found, in a question between an agent of the last indorsee and the acceptors, to be payable, after notice given them by the previous indorser of the first bill, to him alone. The last bill was thus held to be the produce of the first².

There are some limitations of the rule now stated, though none of them are inconsistent with its principles. 1. The rule seems applicable only to those defences which admit the indorser's title to the bill or note, but are pleadable against him on the ground of compensation or otherwise, and not to objections, such as fraud, which would affect his right to the document, though not the right of a third party³; for, so long as a bill or note is transferable, which it continues to be even after it is due, its validity, with reference to third parties, is implied. It has also been held⁴, that the indorsee's claim is liable to exceptions on the bill transaction, and not to those arising from collateral matters. 2. In an action by the holder against the drawer of a dishonoured banker's check, which the drawer *had himself* issued to the payee for value, nine months after its date, he was found to be thereby personally excluded from pleading against a subsequent holder an exception which he had against the payee⁵. The same principle seems applicable to the case of a bill or note. 3. It has been decided, with regard to a bill accepted by the drawee

¹ *Fryer v. Brown*, 1 R. and M. 146.

² *Lee and another v. Zagury*, 8 Taunt. 114.

³ In *Morris v. Lee*, Bayley, 500, a note thirteen years old was found effectual to an indorsee, notwithstanding a charge against the payee, that he had used fraud in obtaining it.

⁴ *Burrough v. Moss*, 10 B. and Cr. 558. There is a number of specialties in this case, which cannot be made use of in a treatise on Scotch law.

⁵ *Boehm v. Stirling*, 7 T. R. 430.

for the drawer's accommodation, which the former allowed to remain in the latter's hands after the term of payment, that a person taking it after that term from the drawer has a good claim on it against the acceptor. It seems to have been held, that the only purpose of giving such a bill to the drawer was, that it might be negotiated, and that this purpose might be served after as well as before the term of payment, if the acceptor still left it in the drawer's hands¹. It was found, indeed, in an earlier case at *Nisi Prius*², that a note granted for the payee's accommodation was not effectual to a person who had taken it after the term of payment from an attorney to whom it had been given to be returned to the granter. But, 1st, Though this case were contrary to the preceding one, it must be held as overruled by it; and, 2^{dly}, The note was obtained, not from the payee, who must have been still held entitled to negotiate it, but from a third party, who committed a fraud in indorsing it. 4. It has been held that an indorsee, even after the term of payment, being in his indorser's full right, is not liable to objections not pleadable against him; so that, if the indorser took the bill or note before the term of payment, an objection that it was granted for a smuggling transaction, not being pleadable against him, cannot be stated against the indorsee³. 5. When the indorser of a bill or note pays it to the holder after it falls due, he will thereby be entitled to recover its amount from any of the preceding parties, though the holder has previously recovered payment in part, or even wholly, under securities which another party lodged with him⁴. The indorser, if he had no notice of such a payment, was entitled to suppose, from the bill being undischarged in the holder's possession, that it was unpaid, and having, therefore, paid it, is entitled to indemnity from the previous parties. 6. When a banker has received a bill before it is payable, in security of a balance due to him, and it is afterwards returned to his debtor, who, however, after payment is refused to him, gives it back to the banker on the same account, without receiving new credit for

¹ *Charles v. Marsden*, 1 Taunt. 224, *per* Court of Common Pleas.

² *Per* Lord Ellenborough in *Tinson v. Francis*, *antea*, 299, note 2.

³ *Per* Lord Ellenborough in *Chalmers v. Lanion*, 1 Campb. 383.

⁴ *Buzzard v. Flecknoe*, 1 Stark. 333, *per* Lord Ellenborough.

it, it has been found that the banker resumes his former rights in it, so as not to be affected by intervening exceptions against the right of the party depositing it¹. As the banker's right depended in this case on the original indorsement by his debtor, which appears to have remained, it must have drawn back to the date of the indorsement, as soon as the bill came again into his hands. It was held, in the same case, that all securities in a banker's hands were to be considered as given for value, whether they exceeded or not the precise balance due to him. 7. It has been found that an indorsee, after the term of payment, though his right may be affected by entries proved to have been made by his indorser, in his own books for instance, at the same time and as part of the same act with his indorsement, will not be affected by other entries, not proved to have been so made, but which may have been made afterwards².

2. Law of Scotland on this subject.

In Scotland, it does not appear to have been held, that the mere circumstance of a bill or note being indorsed after the term of payment renders it suspicious, or binds the indorsee to inquire into the latent objections affecting his indorser. The efficacy of such an indorsement against latent objections seems to have been admitted; and the only question was, whether some period, subsequent to the term of payment, should not be fixed, after which these objections would become available against the indorsee. Such a limitation was at first necessary, as no period was then fixed for the prescription of bills, so that there was no rule for determining, whether a bill remained effectual, as a ground of action, for twenty or thirty years, or even for a longer period. But, as the mere circumstance of the indorsement taking place after the term of payment was not held to cut off the indorsee from the ordinary privileges of a holder, there was no certain rule for limiting their duration.

In an early case, of a bill indorsed long after the term of payment, and which had lain over for five years, without pro-

¹ *Per Lord Ellenborough in Bosanquet v. Dudman*, 1 Stark. 1, part 2.

² *Collenridge v. Farquharson*, 1 Stark. 259, *per Lord Ellenborough*. *Vide also Bayley*, 121-2.

test, diligence or action, the Court decided, in an action by the indorsee against the acceptor, that the former was liable to compensation on a debt due to the latter by the indorser, who was likewise drawer ¹, holding, "That after so many years, they (viz. indorsations) should be reckoned no better than common assignations, admitting of compensation and other legal defences." The interlocutor proceeds on the separate ground, that there had been no protest against the acceptor, before the bill was indorsed. But the Court likewise found, that the privileges of the bill were cut off by its lying so long over, as "no merchant would accept of such a bill in the way of commerce, to afford the extraordinary privileges of bills of exchange during the long prescription." In a subsequent case, compensation was sustained on a debt due by the indorser, against the onerous indorsee of a bill which had lain over without protest or diligence for three years. But it was repelled, under similar circumstances, in an action on a bill which had lain over for two years and eleven months ². A contrary decision was given in an action of recourse against the drawer of a bill, by a person to whom it had been indorsed six years after its date, (no diligence having been done on it in the meantime,) with reference to a plea urged by the defender, that his indorser had been guilty of breach of trust in indorsing it, which plea was sustained against the pursuer ³. In an intermediate case ⁴, the plea of compensation against an onerous indorsee, on account of the original creditor's debt, was repelled with regard to a bill which had lain over without diligence for a year from the term of payment. Afterwards, in an action by the indorsee against the acceptor of a bill which had lain two years in the drawer's hands without diligence, and then two years in the indorsee's hands before he made a demand on it, (the Rebellion, however, having intervened,) the pursuer was found liable to compensation on a claim of relief by the acceptor

¹ Murray v. Grierson, 18th Feb. 1715, Morr. 1623.

² Farquharson v. Brown, 6th Feb. 1719, Morr. 1626.

³ Grierson v. The Earl of Sutherland and Lord Strathnaver, Feb. 1728, Morr. 1626.

⁴ Hodge v. Spiers, Jan. 1729, Morr. 1627.

⁵ Mansfield v. Buchanan, 18th Nov. 1738, Elchies, No. 18, v. Bill.

against the drawer for debts paid on his account ¹. In the next case ², compensation on a similar debt was sustained against an onerous indorsee, in an action by him on a bill which had lain over without diligence for five years. It does not appear when the indorsement was made, though it is implied that it was subsequent to the term of payment. Again ³, a person to whom a bill had been indorsed for value eighteen months after the term of payment, was, notwithstanding, found liable to a plea of compensation, on a debt due by the drawer and indorser to the acceptor. Some of the Judges, it is said, held that such a plea of compensation should be effectual immediately after the term of payment. But the majority held that it should commence when the privilege of summary execution ceased, viz. at the end of six months from the term of payment, and, accordingly, the decision is reported as proceeding on this principle. The same period of limitation appears to have been suggested by some of the Judges in an earlier case ⁴. But there does not appear to be any reason for limiting the privileges of bills to this, or any other period, if they are once held to subsist after the term of payment. In all the other cases cited, the liability of the indorsee to compensation is made to depend, not on the date of the indorsement, but on the time that the bill lay over without action or diligence, whether in the hands of the original holder or of the indorsee, the Court apparently holding it necessary to fix some limit to such documents, in order to prevent them from being turned into permanent securities. But the decision last cited proceeds on the date of the indorsement.

After the enactment of the sexennial prescription, the privileges of bills and notes, including the indorsee's freedom from compensation on the indorser's debts, seem to have been then extended to six years, so that he enjoyed this privilege if the bill or note was indorsed to him during that period. This was at first decided on the ground of the sexennial limitation, in a case where compensation was proponed, without success, against the onerous indorsee of a bill which had lain

¹ Thomson v. Colvil, 1st Feb. 1749, Morr. 1632, Elchies, v. Bill, No. 43.

² Smith v. Douglas, 10th Feb. 1762, Morr. 2692.

³ Scougal v. Ker, 24th Feb. 1764, Morr. 1407.

⁴ Thomson v. Colvil, note 1.

over without action or diligence, two years after its date, and eighteen months after the term of payment¹. The unsuccessful argument in support of compensation was founded, not on the date of the indorsement, which may probably have taken place before the term of payment, but, agreeably to the principle of most of the former decisions, on the time that the bill had lain over. In the next case, which was that of a bill indorsed to the pursuer about five years after its date, a plea of compensation on a debt due to the acceptor by the original creditor was repelled; the successful argument being, that the extraordinary privileges of bills ought to last during the full period that they were declared to subsist as probative documents². Again³, in an action against the acceptor by a party to whom a bill had been indorsed after lying over two years, the defender having pleaded that he had accepted for the drawer's accommodation, and that the indorsee was liable, as well as the drawer, to this exception, the Court not only repelled that plea, but held, that, when there was no fraud, and when the bill was not dishonoured *ex facie*, the indorsee was entitled to freedom from the exceptions pleadable against his indorser, as a *statutory privilege*. The same ground of decision was adopted in a subsequent case⁴, where the Court repelled a plea of compensation by the acceptor on a debt due to him by the original creditor, when urged against an one-rous indorsee who had taken the bill more than three years after it became due. The defence in the first of these cases, viz. that the bill had been accepted for the drawer's accommodation, would have been sufficiently answered by the doctrine already mentioned⁵ as settled in England, viz. that, if an accommodation-bill is left by the acceptor in the drawer's hands after the term of payment, so as to enable him to negotiate it to a third party, the acceptor cannot plead against that party the objection of its being an accommodation-bill, as he must be held to have left it with the drawer for the purpose of being so negotiated. But the exception pleaded against the indorsee was repelled in both cases by the Court,

¹ Elliot v. M'Kay, 16th July 1777, Morr. 1648.

² Robertson and others v. M'Glashan, 6th Feb. 1787, Morr. 1648 and 11129.

³ Wilson v. Wilkie, 30th Nov. 1811, F. C.

⁴ Crawford v. Robertson's Trustees, 30th June 1814, F. C.

⁵ *Antea*, 301-2.

on the ground that freedom from such exceptions was a "statutory privilege" conferred by the act 12 Geo. III. c. 72.

This act, however, does not seem to confer any privileges on bills or notes, except by placing notes on the same footing with bills. Its chief purpose is to fix a period within which they shall cease to produce diligence and action. The privileges of bills, and consequently those of notes, are left by it as before on the ground of mercantile usage. No doubt, the reason which existed before for limiting the duration of their privileges, viz. that otherwise they would last for an indefinite period, ceased to exist after the sexennial limitation. But, in extending their privileges to six years, no regard was had to the presumption, which has received effect in England, that a bill or note which remains unpaid after the term of payment is a suspicious document; and that, therefore, as no person ought then to take it without inquiring into the exceptions pleadable against his indorser, he should incur the risk of such exceptions. Such a presumption, though not yet admitted in Scotland, appears to be well founded in principle, as well as in the commercial practice of England. It may perhaps be doubted, whether the foregoing decisions have completely fixed the law in Scotland contrary to the English decisions; for in one case¹, the Second Division of the Court held, conformably with the English authorities, that a bill, on which action had been raised five years after it became due, was, independently of a vitiation in the address, a suspicious document from the lapse of time, and that the holder, whose name appeared as drawer, was liable to the exception pleaded by one of the drawees, that it had been accepted for the accommodation of the other drawee. The Scotch authorities now mentioned were not referred to in this case. On the other hand², in a later case, a contrary judgment was given. In another case³, where a bill was not only past due, but had a marking on it which implied that it had been previously discounted, the Court, proceeding in a great measure on this marking, decided that a bank which had taken the bill with such a marking of a former discount, (and consequently of its

¹ *Annan v. Robertson*, 2d Division, 27th May 1825, 4 S. and D. 40, F. C.

² *M'Gowan v. M'Kellar*, 24th Feb. 1826, 4 S. and D. 498. *Vide also* *Young v. Pollock*, 15th Nov. 1831, 10 S. and D. 8.

³ *Smith v. Murdoch and others*, 28th May 1829, 9 S. and D. 670.

having been formerly retired,) was not a *bona fide* (though it might be an onerous) holder, and that, therefore, the plea of no value by an acceptor was equally available against them, as it would have been against the previous holder for whom he had accepted it. In one of the cases now referred to¹, the noting of one of the bills sued for, with certain other markings made on it by a clerk, were not regarded.

Whether the English or the Scotch doctrine, as now stated, is adopted, their respective principles are equally applicable to bills or notes payable at a fixed term, or at sight, or on demand. According to the doctrine hitherto followed in Scotland, the privileges of a bill or note payable on demand would last for six years from *its date*, since it has been found that its duration as a document of debt runs from that period². Even according to the rules adopted in England, neither bank-notes, nor notes issued by banking companies, can be liable at any time, in the bearer's hands, to the exceptions pleadable against previous holders, because they have perpetual currency, from the unlimited power which is given by the stamp-laws, of re-issuing them even after they have been paid. But it has been held that such exceptions are pleadable against the bearer of a check payable on demand, if he has taken it a long time after its date, because such a check ought to be presented for payment within a reasonable time, and is therefore considered, if not so presented, as a suspicious document, which no third party should take without inquiry³. In Scotland, according to the doctrine already stated, such a document being, in most respects⁴, equivalent to a bill, would preserve its extraordinary privileges for six years from its date.

¹ *Young v. Pollock*, 307, note 2.

² *Stephenson v. Stephenson's Trustee*, 16th June 1807; *Morr. App. to Bill*, No. 20.

³ This doctrine was laid down in *Boehm v. Stirling*, *antea*, 299, note 3, although the parties who pleaded the objection were held to be excluded from it by their own act, in respect that they had themselves issued the draft nine months after its date. The same doctrine was also held recently, in *Downe v. Halling*, 2 C. and Pay. 11, 4 B. and Cr. 330, 6 D. and R. 455, where it was decided that the circumstance of a check being five days overdue when it was taken, rendered it a suspicious document, so as to throw on the holder the burden of proving how he came by it, without its being necessary for the previous holder to shew that it had been lost by or stolen from him.

⁴ *Antea*, 191.

SECTION V.

Bills or Notes lost, stolen or destroyed.

The holder of a bill or note has full right to it, under the modifications now stated, although it has been lost by, or stolen from the owner, and has been given to the holder by a person who has no proper right to it. But, against the person who has found or stolen it, if the theft or finding is proved, an action lies to recover the document or its value, as was decided lately in an action of trover for a bank-note of £.500¹. In another case², trover was sustained for recovery of a bill from the last holder, by a party who had a lien over it, though certain other parties, who had a limited interest in it, had previously recovered damages, in a separate action, against the same defendant, for his unlawful conversion of it. A bill or note which has been indorsed in full by the payee cannot be transferred, by mere delivery, without an indorsement by the special indorsee, although a blank indorsement by the payee, or any other person in right of the bill or note, will transfer it to the bearer notwithstanding subsequent special indorsements, if he deletes these indorsements³. But a bill or note payable to the bearer, or with the last indorsement blank, is transferable, as already explained, by mere delivery. In Scotland, the holder of such a document, though he should have got it from a person who found or stole it, is not bound, even on notice by the former owner, to prove that he gave a consideration for it, but the other party must prove that he gave none, and that he was otherwise in collusion with the thief or finder⁴.

In England, a holder may, under such circumstances, recover from any of the previous parties, and they may safely pay to him, though he should not prove to them that he gave any consideration for the bill or note⁵. But it has been de-

¹ *Holiday v. Sigel*, 2 C. and Pay. 176.

² *Knight v. Legh*, 4 Bingh. 589.

³ *Antea*, 271.

⁴ *Antea*, 95.

⁵ *Per Holt*, C. J., 3 Stalk. 71.

cided that a banker who paid a lost check the day before it fell due, though he had no notice of the loss, was bound to pay the amount again to the loser, such a payment being held not to be in the ordinary course of business ¹. It has been also decided, in a case already cited ², that bankers who discounted to a stranger a bill made payable at their bank, and drawn on a customer of theirs, after they had been warned not to do so, as it was lost, and afterwards gave it up to the drawee as a voucher of his account, became thereby liable in an action of trover to the former holder. Farther, when it is shewn that a bill or note has been lost or stolen, even the holder, on reasonable notice given him beforehand, to instruct the circumstances under which he received it, will be bound to prove, both that he got it *bona fide*, and that he gave a valuable consideration for it ³; and it has been even decided ⁴, that, whenever the original payees of a bill or note could not, from want of consideration, recover on it, the indorser must prove the consideration which he gave, even without notice to do so. More recently, however ⁵, it has been held, that there were circumstances of suspicion in the case now cited, which rendered proof of the consideration necessary, without laying down the general rule so broadly, which, as was said, tended to restrain the negotiability of bills and notes; and, accordingly, where there was no ground of suspicion, the third indorsee of a bill which was said to have been granted without consideration between the drawer and acceptor, was exempted from proving a consideration for his indorsement. But, it has been held, that a party receiving a bill from a person who was employed only to discount it, and placing it against a debt due by him, is liable, on being informed that his author had

¹ *Da Silva v. Fuller*, cited by Chitty, 286.

² *Lovell v. Martin*, *antea*, 285, note 7.

³ *Paterson v. Hardacre*, *Lawson v. Weston*, *antea*, 94, note 3.

⁴ *Heath v. Sansom*, 2 B. and Ad. 291. Parke, J. diss. and referring to *Collins v. Martin*, 1 B. and Pull. 648.

⁵ *Whittaker v. Edmunds*, 3 M. and Rob. 366. A similar doctrine was laid down by the Court of Common Pleas in *Low v. Chifney*, *per Patteson, J.* It was besides held, in this case, that the defendant had not proved want of value from the drawee to the acceptor; 1 Ad. and Ell. 638, 1 Bingh. N. S. 267. The same doctrine seems to be also implied in *Bramah v. Roberts*, 1 Id. 469.

got it only for the purpose of discount, to trover for recovery of it¹. When, however, the holder's title has not been impeached, he is not bound to prove a consideration, although a witness should be tendered to swear that less than the amount of the bill by £.32, (the proper discount being only £.1, 19s.,) was got from a party who was not shewn to be the holder's agent, and for whom he was not responsible².

These rules seem to be enforced in England, even as to the notes of private banking companies, so far as they can be identified. With regard to bank-notes, they have been a good deal relaxed. It seems to have been the practice, in some of the earlier cases, when a bank-note was lost or stolen, to require that the person afterwards claiming on it should prove, on notice given him for that purpose, that he got it for a valuable consideration³. The same fact appears to have been proved in a later case, where a person who had received certain bank-notes in payment of a bill from a third party acting for the debtor, after a commission of bankruptcy had been issued against the debtor, was found not liable to restore them to the assignees, though they had been obtained by discounting bills, which vested in the assignees by the commission⁴. In another case, of nearly the same date, where⁵ a party brought an action of trover to recover a bank-note for £.500, which he had presented for payment, and which the bank had detained at the instance of the former owner, from whom it had been fraudulently obtained, the plaintiff not having *proved* that he gave value for it, before getting notice of the original mode of its acquisition, to a foreign house, (his correspondents,) from whom he received it; and, on the other hand, this house giving no account of it, except that they got it in payment of goods from a person unknown; and it being also proved that bank-notes of so large an amount were not circulated generally in that foreign country; Lord Kenyon, C. J., holding the plaintiff to be merely agent for the house from whom he got the note, was about

¹ Cranch v. White, 1 Bingh. N. S. 414.

² Basset v. Dodgin, 10 Bingh. 40.

³ Consult on this subject Miller v. Race, 1 Burr. 452-9.

⁴ Lowndes v. Anderson, 13 East. 130.

⁵ Solomons v. The Bank of England, 13 East. 135.

to leave it to the Jury, whether they were to be held, on the evidence, as privy to the original fraud, when the plaintiff, at his own desire, was non-suited, and the non-suit was confirmed by the Court of King's Bench. The Court suggested that the plaintiff might try his right in another action, viz. for payment of the note. In this case, although the plaintiff, who was agent for the foreign house, was held to have got the note as their agent, in respect that he had not then given value for it, his constituents do not seem to have been considered as bound to *prove* that they gave value for it; but it was held to be a question, on their own statement and other circumstances, whether they were not privy to the original fraud¹.

In a subsequent case² of trover for a bank-note of £.500 which had been lost, the defendant's country bankers proved that they had given value for it, but were held to have acted incautiously, in changing so large a note, in a small country town, to a stranger, without asking questions, except as to his name, and were therefore found liable for the amount to the former owner. It was proved that the loss of the note had been notified in a number of newspapers, but none of them was brought home to the defendants.

In another case³, where country bankers, a year after notice given them of the loss by robbery of three notes for £.200, £.100 and £.50, had changed the note for £.200 during a race-week, without asking the holder's name and address, the Jury, under the direction of Abbot, C. J., found them liable for the amount to the true owner, it being held that they had not used sufficient caution.

In a later case⁴ of trover against the Bank of England

¹ In this case Grose, J., held that the possessor of a bank-note "has a right" in the first instance, to say that he will not tell how he came by it; but that, if the bank makes out a *prima facie* case of fraud against him, he must clear himself of it.

² *Snow v. Peacock*, 2 C. and Pay. 215, 3 Bingham, 466. A rule nisi for a new trial, in this case, was, after argument before the Court of C. P., discharged. Evidence was brought of the caution used by the Bank of England and London bankers as to the exchange of large notes, and the amount of the note was considered by the Court as an important element in the case.

³ *Snow v. Leatham*, 2 C. and P. 314.

⁴ *De la Chaumette v. Bank of England*, 9 B. and Cr. 208.

for a bank-note of £.500 detained by them from the plaintiff, who had presented it for payment on the ground of its having been stolen, it was ruled, 1st, That the plaintiff must be held the mere agent of the foreign house from whom he had received it, not having given them new credit on the faith of it, though they were previously his debtors; and, 2^{dly}, That they, being the real parties, must prove that they had given such value for it, as to exempt them from reasonable suspicion as to their mode of acquiring it.

In another case¹, a person who had lost certain bank-notes was found entitled to recover them from the party who had found them, on proving that the notes so found were his. Again², in an action by a party who alleged that he had lost a bank-note, to recover it from the possessor, the latter was not required to *prove* the consideration which he gave for it; but Lord Ellenborough held that he must be presumed to have got it for a valuable consideration, which presumption the plaintiff was bound to impeach; and farther, that though he might have thrown such suspicion on the defendant's conduct, as would have made it necessary to prove his mode of acquiring it, and the consideration given by him, yet, as he had not done so, he must be non-suited. This decision seems to import, that the mere possession of bank-notes presumes property, and that this presumption cannot be set aside without such indications of fraud as would be conclusive, unless refuted by evidence of the mode of acquisition.

There is another class of cases, which depends chiefly on the question, whether bankers taking a bill or note have used due caution, or whether there were such circumstances of suspicion as should have put them on their guard. In such cases, when it appears that there has been ground of suspicion, and want of caution, it has been decided, that the bankers acquire no good right to the bill or note, though they should have paid full value for it. Thus³, where a bill, which turned out afterwards to be stolen, had been presented at a bank to the banker's clerk for discount between

¹ Richard and another v. Carr, 1 Campb. 551; *vide* also Holiday v. Sigel, 2 C. and Pay 176.

² King v. Milsom, 2 Campb. 5.

³ Gill v. Cubitt and others, 3 B. and Cr. 466, 5 D. and Ry. 324.

9 and 10 in the morning, by a person whose features the clerk thought he knew, but not his name; and the clerk, (after the bill had been allowed to lie two hours in the bank till he satisfied himself as to the acceptors,) had discounted the bill and paid full value for it, under deduction of discount and commission, without requiring the holder to indorse it, it was held, first by a jury, and afterwards by the Court of King's Bench, that there were circumstances of suspicion, which excluded the banker from pleading that he had taken the bill *bona fide*, and in the usual course of business. The time of discounting the bill was mentioned as unusual, though the bank was then open. But the chief ground for the opinion of the Court was, that the banker was bound, if he did not know the holder, to inquire about him, and that, therefore, he could not recover on it against the acceptor. This case cannot be reconciled with a Scotch decision already referred to¹, or the principles deduced from it, as recognised in Scotland.

In a case², where a party had changed a £.1000 bank note, to a person whom he knew to be in pecuniary difficulties, by giving bills for it to the amount of £.704, (paying interest for the time they had to run,) and cash and notes, as he alleged, for the balance, but could not make a precise statement, or adduce written evidence regarding them, (though his clerk confirmed generally his account of the transaction,) a Jury, proceeding on these and other suspicious circumstances, found a verdict for the owner of the note, in an action of trover brought to recover it, and the Court of King's Bench refused a new trial. The rule adopted in both these cases, was, that the holder of the bill or note must prove his *bona fides*. In another case³, the Court of King's Bench held, (though the decision did not turn on that point,) that it was not necessary, in all cases, for the former owner to give precise evidence that the bill or note had been lost or stolen from him. It was laid down by Abbot, C. J., that the defendants, though they were not guilty of fraud, and had given full value, had got the document under circumstances

¹ Lambton and Co. v. Marshall, *ante*, 95, note 1.

² Egan v. Threlfall, 5 D. and R. 326, 2 C. and Pay. 11.

³ Down v. Halling, 4 Barnw. and Cresw. 330, 6 D. and Ryl. 455.

which ought to have raised their suspicion. But the ground on which his direction was ultimately confirmed by the Court of King's Bench, was, that the mere circumstance of the document, viz. a banker's check for £.50 being taken in payment of purchases to the amount of £.6, 19s., when five days overdue, rendered it a suspicious document, so as to throw on the defendants the burden of shewing how they came by it, without previous proof by the plaintiffs that it was lost or stolen from them. In a later case¹, where a person who had been robbed of his pocket-book, containing *inter alia* a bill blank indorsed, had advertised it as containing nothing that was of use except to the owner, it was decided that a bank which had discounted the bill to two strangers, one of whom represented himself as the owner's son, was not liable to restore him the bill, seeing that they had not been guilty of negligence, and that his advertisement, if they had seen it, could only have misled them.

In a case², where the plaintiffs sued for payment of a note which had been lost, and which they had taken from a stranger, in payment of goods purchased by him, after he had given his name and address as of Taunton, and as being recommended by a person there, and desired the goods to be sent to a public-house, which was not a booking-office, the Jury found against the plaintiffs, and the Court, holding the question to be proper for them, refused to disturb their verdict. On the other hand³, the Court granted a new trial, after a verdict obtained by a person who had lost a bank-note for L.30, against a party who said, according to one witness, (though another gave a different account,) that he had got it in payment of a bet at a horse-race, and had kept no account of the notes. But in a later case⁴ of trover by the owner of a bank-note for £.500, against a person who said that he had got it in payment of a bet, but could not tell from whom, the plaintiff was found entitled to recover, as the defendant had not used sufficient caution. Nor was the plaintiff's rashness in go-

¹ Beckwith v. Carrol, 2 C. and Pay. 261; 3 Bingh. 444; 5 B. and C. 444.

² Slater v. West, 3 C. and P. 325.

³ Snow v. Sadler, 3 Bingh. 610.

Easley v. Crockford, 10 Bingh. 243.

ing to a public meeting, where he lost the note, with such a sum in his pocket, held to make any difference.

In a case of trover for recovery of a bank post bill for £.100, which the plaintiff had left with her reticule in London in a hackney coach, and afterwards duly advertised, and which the defendant, a banker in Brighton, who had not heard of the loss, cashed eight days afterwards to a stranger, who said he was on a journey, and, on being asked for his name and address, wrote on the bill, in an illiterate hand, an address which turned out to be fictitious, the Jury found for the plaintiff, and the Court refused to disturb their verdict¹. In another case², for the amount of a lost note, a £.200 Bank of England note, in two halves, which had been cashed, in twenty-four hours after the plaintiff lost it, by a country banker, to a stranger of genteel appearance, who, on being asked to call back at four o'clock, did so, and gave a name and address, stating that he wished to bet at a fight, which took place there on that day, the Jury, under direction of the Court, gave a verdict in the plaintiff's favour.

In a later case³, where a person took a bill *bona fide*, though under circumstances which should have excited the suspicion of a prudent man, he was found entitled to maintain action on the bill. It was held by the Court, that the doctrine laid down in the case first cited on this subject⁴, went too far. In another case⁵, where the first indorsee of an accommodation-bill had transferred it fraudulently to a third party who acquired it *bona fide*, the Court of King's Bench held, unanimously, that the latter had a good action on it, unless he had taken it under circumstances which inferred gross negligence.

It is difficult to judge how far the principles laid down in these cases would be adopted in Scotland. But they would probably be followed to the extent of regarding every such case as a jury question, to be determined from its special facts, and, *inter alia*, from the explanation by the party who

¹ *Strange v. Wigney*, 6 Bingh. 677, 4 M. and P. 470.

² *Bridger v. Heath*, Chitty, 283, note a.

³ *Backhouse v. Harrison*, 5 B. and Ad. 1099.

⁴ *Gill v. Cubitt*, 314, note 1.

⁵ *Crook v. Jadis*, 5 B. and Ad. 909.

took the bill or note, of the circumstances under which he had received it.

In Scotland, although the possession of bills and notes blank indorsed or payable to the bearer, presumes property, that presumption may be redargued by evidence of fraud; and such evidence, again, may be refuted by proof as to the mode of acquiring the instrument, and the value given for it. Lord Ellenborough's doctrine in a case already cited¹, though referring specially to bank-notes, extends in principle to all the instruments now described, where he observes, that "it would greatly impair the credit, and impede the circulation of *negotiable instruments*, if persons holding them "could, *without strong evidence of fraud*, be compelled, by "any prior holder, to disclose the manner in which they received them." This opinion seems to adopt the doctrine of the law of Scotland as to such instruments, without making any distinction as to the case of their having been lost by or stolen from a former owner. But such an opinion is not consistent with the rule enforced by some decisions, as to the necessity of the holder proving, in these two cases, the consideration which he gave for them.

It has been said, that the holder of a bill or note transferable by delivery, when he loses it, whether by theft or accident, should give notice of the loss to all the previous parties, and very proper directions have been given as to the mode and terms of such notice². Such notice is undoubtedly necessary, that payment may not be made without some inquiry into the right of the party claiming it. But, according to the doctrine now laid down, the holder, unless fraud or culpable negligence is established against him, will be entitled to recover payment, and the former owner, being divested, will have no title to exact payment. Public notice ought to be also given of the loss of a bill or note transferable by delivery, in order to prevent any person from taking it. But such notice will not be effectual to stop the transference, unless it is brought home to the party taking the bill or note³.

¹ King v. Milsom, 313, note 3.

² Beawes, No. 179; Pothier, No. 132; Chitty, 275, and cases there referred to.

³ In Lawson and others v. Weston, 4 Esp. 56, an advertisement of the loss in the newspapers was held not sufficient to affect the party taking a bill.

It has been decided, both in Scotland and England, that the Postmaster-general is not liable for bills or notes stolen from letters put into the Post-office, although the theft has been committed by a letter-carrier¹; since the Postmaster is responsible only for the execution of his own duty, and not for the conduct of inferior officers, who hold their appointments directly from the Crown. But a deputy-postmaster is responsible for not delivering letters in due time, according to their address, within the post-town where he resides², unless where the plaintiff might, by due diligence, have prevented the damage thence arising³. It has been held, that, if a party is desired by his correspondent to remit him money in a bank-bill by post⁴, or even if no instructions be given, yet, as that is the usual mode⁵, he will not be liable to his employer, though the bill should be stolen, and the proceeds drawn by a third party. But he will be liable for the loss, if he has not taken care that the letter is put safely into the Post-office; for instance, if he has delivered it to a bellman on the streets of London⁶.

Although a bill or note should be lost or destroyed, even while in the drawee's hands, the creditor must protest it for non-acceptance and non-payment, as if it were extant, and must give due notice of its dishonour to all the previous parties, otherwise he will lose his recourse against them⁷. The

¹ *Lane v. Cotton*, 1 Lord Raym. 646, confirmed by *Whitfield v. Lord de Spenser*, 2 Cowp. 754. The same point was decided in Scotland, after an argument which referred to these two decisions, in *Farries v. Elder and Scott*, 21st June 1799, Morr. 10103.

² This was decided in *Bowring v. Goodchild*, 3 Wils. 443, where a deputy-postmaster had detained a letter addressed to the plaintiff, on account of his refusing to pay an extra charge of one halfpenny besides the regular postage, which extra charge was found to be illegal.

³ *Hordem v. Dalton*, 1 C. and Pay. 181.

⁴ *Cuming v. Marshall*, 21st Dec. 1752, Morr. 10095. *Vide* also this case as to the proof admitted of the letter containing the notes having been put into the Post-office.

⁵ *Warwick v. Noakes, Peake*, 67.

⁶ In *Hawkins v. Rutt, Peake*, 186, *per* Lord Kenyon, such a delivery was held not to exonerate the defendant, where his correspondent had desired him to remit some money in bills by post.

⁷ This was held by Lord Ellenborough in *Thackray v. Blackett*, 3 Campb. 164, where the drawee of certain bills having destroyed them by mistake, the holder, who, though he presented them for payment, did not notify their non-

protest, in such a case, may be made on a copy of the bill or note.

When a bill or note has been lost or destroyed, its contents may, notwithstanding, be established in Scotland by a process for proving the tenor. In this process, the pursuer must, in the first place, establish the fact and particular mode of its loss or destruction, or the *casus amissionis*, and he will then be allowed to prove the tenor of the writing in the manner required in such processes with regard to all written instruments that are lost or destroyed. In one case¹, the pursuer in a proving of the tenor of a bill, was required to condescend specially on the cause of its disappearance, before he could be allowed a proof, though there was no evidence of its being retired. In another case², the First Division of the Court dismissed a process for proving the tenor of a lost bill, which had been brought against the acceptor's representatives, in respect that no *casus amissionis* was stated, holding that, as to a bill or note, there was a presumption of payment, from the mere circumstance of its being no longer in the creditor's possession, without the necessity of a discharge, as in the case of a bond, and that this presumption was not obviated merely by proving that the bill had once existed. The converse of this doctrine was laid down in an earlier case³, in which it was held that *casus amissionis* did not require to be proved where the writ was not extinguished simply by retiring it. In another case⁴, a process for proving the tenor of a lost bill was dismissed, on the ground that the *casus amissionis* libelled, viz. that the bill had been borrowed with other papers by the debtor's agent, and had never since appeared, was not sufficient to warrant a proving of the tenor, which was held to be matter of great delicacy with regard to a bill, and never to be admitted except on strong grounds. But the Court reserved the pursuer's recourse against the debtor's agent.

payment to the drawer, was found to be thereby precluded from his recourse against the drawer.

¹ Campbell v. York Buildings Company's Creditors, 22d Feb. 1780, Morr. 15828.

² Carson v. Macmicken, 14th May 1811, F. C.

³ A. v. B, 21 Nov. 1749, Morr. 15283.

⁴ Macfarlane v. M'Nee, 28th Feb. 1826, 4 S. and D. 509.

A proving of the tenor may be pursued, not only by the creditor in the bill or note, but by any party who has a direct interest in it; for instance by the acceptor, if he has paid it, and wishes to establish the payment as an article of credit with the drawer, or if the pursuer is drawer, and has given the drawee credit for the bill or note in their mutual account, on the supposition that the drawee was to pay it ¹.

But, although the loss or destruction of a bill or note, and also its contents, be thus proved, the creditor will not be, in all cases, entitled unconditionally, either to have a new instrument from the drawer in place of the former one, if it has been lost or destroyed before the term of payment, or to enforce payment of it when due. If, indeed, the first instrument has been destroyed, so that no claim can arise on it, or has been specially indorsed by the payee to the person who lost it, so that no other person can claim on it, or, being made payable to a specified person, has never been indorsed, the drawer cannot then allege against granting a new bill or note, that he runs the risk of a claim from any third party on the former one, nor can any of the parties liable under it assign this reason for refusing payment ². Probably, however, it would be necessary in Scotland, that the creditor claiming payment of a lost bill or note not indorsed, or specially indorsed to him, or requiring the drawer to grant a new bill or note instead of it, should previously find surety that he will not indorse the first instrument to a third party; if found. In England, no such security would be necessary

¹ Forbes on Bills, 28-9, and case of *Drummond v. Jackson*, 27th Nov. 1701, which is there cited.

² In *Hart v. King*, 12 Mod. 310, Holt, C. J., sustained a claim against the drawer of a bill which was lost, on the latter admitting that he had signed it. It is not said that the bill had been indorsed. In *Long v. Baillie*, 2 Campb. 214, note, which was an action for the amount of a bill made payable to the drawer, and by him specially indorsed to the plaintiff, against the acceptor, the jury found for the plaintiff, on the loss of the principal bill, and the correctness of a copy which was produced being established. As to the case of a bill or note destroyed, *vide* Lord Ellenborough's opinion in *Pierson v. Hutchinson*, 2 Campb. 221; also *Chitty*, 290; *Bayley*, 369. *Vide* also *Flight v. Brown*, 2 Tyrwh 312. In the cases referred to in the text, the English law appears to be nearly the same in principle with the law of Scotland. *Vide* on this subject Forbes on Bills, 28-9.

in an action for payment, because any indorsation made there, after the term of payment, is subject to all exceptions pleadable against the indorser.

On the other hand, if the lost bill or note is blank indorsed, or payable to the bearer, so as to be transferable by delivery, the creditor cannot maintain action for it, without finding surety to the defendant against his being made liable for payment to some other holder. Forbes lays it down, that, in such a case, the drawer may be compelled to give new bills, the same with the former, *i. e.* if number 1 has been lost, that he may be compelled to give another number 2, to be paid if number 1 is not paid; and he seems to think that warrandice will not be required except after the term of payment¹. Warrandice would undoubtedly be necessary in that case; because, at the time when the second bill is granted, a finder of the first bill may have exacted payment from some of the other parties to it. It seems to be also necessary, though the second should be granted before the first falls due; because, though the payment of it be made conditional on non-payment of the first, yet, as the first is payable absolutely, any holder may exact payment under it long after the term of payment, and after the second bill has been paid, on the supposition that it would not be found. Such a case could not occur in England with a party who got the first bill or note after the term of payment, because he would be liable to the exceptions pleadable against the previous holder. Accordingly, it was decided lately², that a party might sue on a bill which had been lost *after it became due*, and might adduce the declaration drawn from it, while extant, as evidence of its contents. But the holder might, according to the doctrine hitherto followed, exact payment in Scotland, without proving that he gave value, or being liable to such exceptions. It would seem, therefore, that the drawer of the first bill is not bound, in any case, to grant a new bill, as mentioned by Forbes, without a guarantee. The creditor seems also entitled to exact payment of the first bill or note from any of

¹ Forbes, 28.

² Glover v. Thomson, 1 Ryan and Moodie, 403.

the parties, on finding surety against their being obliged to pay again. He could not enforce payment by summary diligence. But it would be necessary to bring an action, setting forth the loss of the original document, offering security against its re-appearance, and concluding that he should, on that condition, be found entitled to payment. If the parties dispute its reality, it may be established, either, as already mentioned, by a proving of the tenor, or in the action for payment. If they do not, decree may be given, on sufficient security. This species of action, as well as any other rendered necessary by the loss or destruction of a bill or note, must be brought before the Court of Session, as being a court both of law and equity. In taking a protest for non-payment, though the bill be lost, in order to preserve recourse, it is proper to accompany the protest, as suggested by Marius¹, with an offer of security against its re-appearance. But, notwithstanding the opinion expressed by that author, viz. that, if the acceptor refuses payment on such an offer, he will be liable in all damages, it is doubtful whether any of the parties could be obliged to pay, until the loss was proved in an action, and security found against its re-appearance².

In a case³, where the holders of certain notes issued by two several banks, cut each note into halves, one of which only contained subscriptions, and sent each half to its destination in a separate parcel from the other, the Court of Session decided, on the halves which contained the signatures being lost or stolen, that the holders had no claim against the banks on the remaining halves for the amount of the notes, even on security against the re-appearance of the lost halves. The Court are said to have proceeded on the ground, that the holders had precluded themselves from the equitable remedy which they claimed, by cutting the notes. But the

¹ 80.

² In a recent case, *Ewing v. Hibbert*, 4th July 1823, 2 Shaw, 455, the Court decided, that the creditor in a bill, which was the last of a series of renewals, was not entitled to enforce payment of it from the debtor, without finding caution that none of the former bills should re-appear against him.

³ *Maberly and Co. v. The Bank of Scotland and Commercial Bank*, 1 Shaw, 360-1.

judgment was reversed on appeal¹; and the case was remitted, with instructions to allow a proof of the pursuer's averments in support of his claim, *e. g.* as to the fact of the halves preserved forming part of notes issued by the bank,—the mode in which the other halves were lost, and other facts stated by him, as well as of the defender's counter averments. The defenders, however, having declined to meet the pursuer in this proof, decree was pronounced in his favour². The House of Lords held, that the equitable remedies competent in the case of bills or notes which are entirely lost were equally competent in this case, where only part of them was lost; and that such remedies were not excluded by the circumstance of the pursuer having cut the notes, if he did so only to diminish the risk of loss³. There was not here a proving of the tenor; but the action was brought not on the instruments themselves, but generally for the debt; and their identity was averred merely in support of that action⁴.

The remedies in England, on the loss or destruction of bills and notes, are different in some respects from those already mentioned. 1. It seems to be settled, that, if a bill or note is destroyed, and, even though lost, if it is not negotiable, which bills and notes are not in England, unless payable to order⁵, or if it is specially indorsed by the payee, or has never been indorsed, the creditor may maintain action on it at common law against any of the previous parties, and secondary evidence, similar to what is received with us in a proving of the tenor, will be admitted to establish its contents⁶. There is also an action at law on a bill against a

¹ 1 W. and S. 10.

² 11th March 1826, 4 S. and D. 550.

³ In *Wright v. Smith*, 2 B. and A. 501, the practice of cutting notes into two, and sending the several halves by separate conveyances, was recognised by the Court of K. B., *per* Abbot, C. J., as a reasonable precaution. The case turned on another point, which is noticed afterwards in the Chap. on Negotiation.

⁴ The objection that there ought to have been a proving of the tenor, was disregarded both in the Court of Session and in the House of Lords.

⁵ *Antea*, 85.

⁶ *Antea*, 320, note 2. *Vide* also *Mossop v. Eadon*, 16 Ves. 430, where a promissory-note not negotiable having been cut into two, and one part sent to

party who wrongfully withholds it, as against an acceptor refusing to re-deliver it, because he cannot found an objection to the creditor's right on his own misconduct¹. It has been farther suggested, that there may be an action at law, even on a bill or note which has been lost when blank indorsed, if lost after the term of payment; because, in that case, any holder would be liable to the exception pleadable against the previous holder, viz. that he had recovered². But the better opinion seems to be, that no party to the bill should be thus subjected, without indemnity, to the risk of a future action by a *bona fide* holder of the lost bill, seeing he cannot answer such an action without undertaking to prove that the bill

the debtor, while the other was retained, in order, as was alleged, that he might grant a new note in its place, the creditor, on presenting an application to the Court of Chancery, to have decree for its amount, on finding security against the re-appearance of the part sent, if it should not come to hand, was unsuccessful, partly on the ground that, if she proved the loss of that part, she would have had a good action at law for the amount, as the note was not negotiable. *Vide* the distinction between this case and *Mayor v. Johnson*, as stated by Chitty, 291, note 6. But the last special indorser of a lost bill has been found entitled to sustain a bill in equity against the acceptor, without calling the indorsees, as the acceptor's payment will discharge them, *Macartney v. Graham*, 2 Sim. 285, he granting a bond for their indemnity, on payment. It was held, in terms of *Hansard v. Robinson*, note 2, that the remedy in such a case lay, not at law, but in equity; *Mossop v. Eadon* being held to be over-ruled by that case. The circumstance, too, of a person who bought goods having accepted a bill for the price of them, which the payee (seller) never indorsed but lost, was found, after his bankruptcy, to afford the acceptor no defence against an action for the price, by his assignee. The bill had been past-due for a year and a half at the date of the action; but the want of an indorsement, and the consequent impossibility of the defendant being sued on it, was the ground of decision; *Rolf v. Watson*, 4 Bingh. 273.

¹ In *Smith v. M'Lure*, 5 East. 476, it being admitted that the defendant had accepted a bill, which, however, he had not re-delivered, it was held that the acceptance warranted the plaintiff (the creditor) to give him notice to produce it, and, failing his doing so, to adduce parole evidence of its contents.

² Chitty, 157, 6th edition; Note to Report of Long v. Baillie, 2 Campb. 214. So decided also at *Nisi Prius* in *Glover v. Thomson*, *antea*, 321. But, in *Hansard v. Robinson*, 8 B. and Cr. p. 90, the Court of King's Bench, under similar circumstances, refused action to the indorser against the acceptor on a lost bill, at common law, and held that the plaintiff could only recover in a court of equity, on finding surety for the debtor's indemnity. A similar decision was also given, on the authority of this case, in *Woodford v. Whiteley*, 1 M. and Malk. 517.

was lost after the term of payment ¹. In such a case, therefore, there would probably be no remedy in a court of law ². For, *2dly*, although it seems to be doubted, whether courts of law have not, in some cases, the power of adjusting the terms of an indemnity against the re-appearance of a lost instrument ³, yet this is the proper function of courts of equity ⁴. No action at law, therefore, can be maintained, even with an offer of indemnity, on a bill or note blank indorsed, and, consequently, payable to the bearer, when it has been lost on or before the term of payment, and may thus be sued on again by a third party ⁵. The same rule has been enforced, in some cases, when the instrument was lost after the term of payment, and after action was brought on it ⁶. It has been even carried so far, that, in a case where a bank-note payable to the bearer was sent in two separate parts by post, and one of them was stolen, it was held that an action at law could not be maintained on the remaining half, unless by producing the entire note, or proving that half was destroyed, seeing that any party getting the other

¹ *Vide* Campbell's note, as cited *ante*, 324, note 3, and cases cited, 324, note 3. *Vide* also Powell v. Roach, 6 Esp. 76, where the plaintiff was non-sued in an action at law for payment of a bill which had not been lost till after the term of payment, and which could not therefore have come into the hands of any third party till after that term.

² *Vide* cases cited in the preceding note.

³ *Per* Lord Chancellor in *ex parte* Greenway, 6 Ves. 812.

⁴ *Ibid*.

⁵ This was decided by Lord Ellenborough on a full argument in *Pierson v. Hutchinson*, 2 Camp. 211, 6 Esp. 126. In *Davies v. Dodd*, the holder of a bill, who had lost it, was found not entitled to recover its amount from the acceptor in a court of law, 4 Taunt. 602, although the latter was said to have promised payment, the promise being held unavailable in an action on the bill, whatever its effects might be in an action founded specially on the promise. But, in a court of equity, 4 Price's Exchequer Rep. 177, the holder was found entitled to payment, on giving security for the acceptor's indemnity. *Vide* also to the same effect, *Champion v. Terry*, 7 Moore, 130.

⁶ This was decided in the case of a bill lost after the term of payment, in *Powell v. Roach*, *ante*, note 1; and in the case of a bill picked from the pockets of an attorney's clerk, after action brought on it, in *Poole v. Smith*, Holt, C. N. P. 144. In *Brown v. Messiter*, 3 M. and S. 281, where, before the action, the defendant (acceptor) had admitted his signature, and promised payment, and the bill was thereafter stolen from the attorney; after action a rule *nisi* was obtained for a remit to the Master to ascertain what was due under the bill, and the rule was afterwards made absolute. But this judgment passed by default before a single Judge.

half would have an equally good right of action on it, whereby the defendant might be liable to two actions at once ¹. But it appears, that the two holders would not, in this case, be in the same situation, since the one would instruct the *casus amissionis* of that part which was lost, whereas, (according to the suggestion of a learned author ²;) any party taking the lost part, while he knew nothing of the other, must be held to do it at his own risk, and could not be considered as having the same rights with a holder of the full notes. It does not, therefore, appear, that the debtor was in danger of a second claim from this party, though he had paid the note to the original owner. These principles are applicable to a Scotch case, already mentioned ³, which was decided by the House of Lords in conformity with them.

In these cases, the debtor in the bill or note cannot be liable on the consideration for which the bill or note was granted; because he may be called on by some third party to pay the bill or note itself, and must therefore retain its amount to meet the risk ⁴.

But a court of equity will enforce payment in all these cases, on the bill or note, on the owner giving sufficient indemnity to the debtor against any new claim by a third party ⁵.

3. By a special statute, 9 and 10 Will. III. c. 17, § 3, when inland bills, as therein described, are lost before the

¹ *Per* Lord Ellenborough in *Mayor v. Johnson*, 3 Camp. 324.

² Bayley, 374.

³ *Maberly and Co. v. The Bank of Scotland and others*, *ante*, 322-3.

⁴ This was the ground of judgment in *Dangerfield v. Wilby*, 4 Esp. 159, where the plaintiff, to whom a promissory-note had been granted, which he said that he had lost, was found not entitled to sue the defendant on the original consideration, as the note might be still in circulation, and might be demanded from him by a third party. In *Bevan v. Hill*, 2 Camp. 381, the defendant having given the plaintiff, in payment of some stock purchased, a check on his bankers, which she lost, and having refused to pay the amount without an indemnity; and in the meantime the bankers having failed, before the defendant withdrew his funds, and he having drawn no dividend from their estate; Lord Ellenborough non-suited the plaintiff, in an action on the original consideration, holding that the defendant was justified in keeping his funds with the bankers to answer the check, unless he had got an indemnity.

⁵ *Tercese v. Geray*, Finch, 301; *ex parte Greenway*, 6 Ves. 812; *Mossop v. Gordon*, 16 Ves. 430; *Davies v. Dudd*, 4 Price, 177.

term of payment, the drawer will be obliged to give another bill of the same tenor, on security being given for his full indemnity, in case of the re-appearance of the first bill. It has been doubted whether this provision extends to *all* inland bills, or is confined to the kind of bills previously mentioned in the statute, viz. those bearing to be for value received, and payable a certain time after date¹. On the other hand, it has been even held that the equity of the statute extends to indorsements, and that, by the act 3 and 4 Anne, which gives the same remedies on promissory-notes as on bills, this provision is likewise extended to them².

It is said³, that, if a bill is lost by the drawee, with whom it has been left for acceptance, or if he has given it by mistake to a wrong person, or if, in any way, the creditor cannot get it back, the drawee must give the creditor a note for its amount, payable on the same day with it, on delivery of the second part of the bill, if then arrived, or, if not, on delivery of the note; and that, if he refuse, a protest must be immediately taken for non-acceptance, and, on the arrival of the term of payment, and this likewise being refused, then a protest must be taken for non-payment. If such a note is granted, but not paid, the same measures must be taken to enforce payment of it as of a bill.

¹ Beawes, p. 557; Chitty, 289-90.

² Bayley, 130, note 24.

³ Beawes, No. 188; Marius, 121-3.

CHAPTER IV.

OF ACCEPTANCE.

TRANSFERENCE, by indorsement or otherwise, has been discussed before acceptance, because the former is common to bills and notes, whereas the latter is peculiar to bills. It has been said, that a promissory-note may be considered as a bill accepted at the time of issuing¹. But, according to its plain import, it is a direct obligation by the granter to pay a certain sum to a third party. A bill, on the other hand, is a request to a third party, called the drawee, to pay a certain sum, either to the drawer or to some creditor of his. The act by which the drawee binds himself to pay, in terms of this request, is his acceptance.

Bills payable on demand require no acceptance, because they are due when presented. Whether acceptance is necessary in bills payable at sight, depends on the question whether they are payable on demand, or whether three days of grace must be allowed on them. This point shall be afterwards discussed, in considering the payment of bills.

There is another kind of acceptance, called acceptance *supra* protest, which shall be separately considered².

¹ 2 Blackst. 470, Bayley, 170.

² *Vide* Chapter on Negotiation.

SECTION I.

Who may accept ?

The rules which have been laid down, as to the parties generally to bills or notes, apply also to acceptors. If the holder of a bill finds the drawee incapable of contracting ; for instance, a minor, a married woman, or an idiot, he may consider the bill as dishonoured¹, and protest it for recourse against the drawer. The drawing of a bill implies a guarantee by the drawer, that the drawee is capable of binding himself, and, if not, the drawer will be liable for his non-acceptance from incapacity, as well as from any other cause. It has been already shewn that a person may become bound, as acceptor of a bill, by the act of his agent². But a clear and express authority from the principal must be produced, otherwise the holder will not be bound to take such an acceptance as effectual³. It has been said⁴, that if the holder takes an acceptance by procuration, without notice to the other parties, they will be released, if the procuration turns out bad. But it will immediately appear, that no notice could prevent such a result, unless the acceptance were rejected, and the bill protested for non-acceptance. The holder, therefore, admits the procuration at his own risk. It has been doubted, whether the holder of a bill is bound to take an acceptance, in any case, by an agent⁵, as it multiplies the proof which he must bring in an action on the bill. This doctrine is inapplicable in Scotland, where no proof of subscription is necessary even to authorise summary diligence on a bill or note, and where, as already mentioned⁶, summary diligence would be issued against the principal, on a document signed for him by procuration, leaving him to dispute the procuration, like the genuineness of his signature, in a suspension. But although

¹ Chitty, 310.² *Antea*, 220.³ Beawes, No. 87.⁴ 1 Bell, 390.⁵ Chitty, 310.⁶ *Antea*, 222, note 1. *Vide* also Chap. on Action and Diligence.

the holder were obliged to prove the procuration, that does not appear to be a reason for refusing to take such an acceptance, as this is a recognised mode of subscribing bills, which all parties must have had in view. Beawes observes, that the holder must take such an acceptance when the procuration is clear¹. The two cases cited to the contrary² do not relate to bills, but to transactions not generally managed by procuration, and in which, therefore, the party was found not liable to accept the procurator's acts as those of his principal.

It has been already considered³, whether an acceptance is valid, when made by a party to whom the bill was not addressed. In the opposite case, where a bill is addressed to two persons not in partnership, and only one of them accepts, the holder is not bound to take the acceptance, as it is not conformable with the bill⁴, unless the bill is addressed to two persons, "or either of them," in which case the acceptance of either is a sufficient compliance with the drawer's mandate⁵. The objection to bills or notes which are uncertain as to amount, or the names of the payee or debtor, or the ultimate enforcement of the obligation, viz. their inconsistency with the nature of a bill or note⁶, does not seem to be applicable in this case, since one obligant at least, viz. the drawer, is bound at all events, whether the one drawee or the other accepts. When a bill is drawn on several partners, the acceptance of one partner, either under the company's firm, or for himself and the other partners, is sufficient⁷. His individual acceptance is insufficient⁸.

¹ No. 87.

² *Coote v. Callaway*, 1 Esp. 116, and *Richards v. Barton*, id. 268, cited by Chitty, 310.

³ *Antea*, 183, note 1.

⁴ This is implied in the doctrine stated *antea*, 234, note 2. *Vide Molloy*, 2, 10, 18; *Marius*, 64-5.

⁵ *Scarlett*, C. 10, R. 39; *Beawes*, No. 228; *Marius*, 65.

⁶ *Antea*, 9 and 19.

⁷ *Antea*, 241.

⁸ *Ibid.*

SECTION II.

Time of Acceptance.

By the custom of merchants, the drawee is allowed twenty-four hours, or till the day after the bill is presented to him, to consider the state of accounts betwixt him and the drawer, and determine whether he will accept or not ¹, unless the post goes out in the meantime, when it is said that the bill, if not accepted immediately, should be protested, so that its dishonour may be notified by the first post ². If acceptance is refused within the twenty-four hours, a protest and the other necessary measures ought to be taken immediately ³. If the drawee, after keeping the bill for twenty-four hours, requires more time, it has been pointed out as the safest course, to give the other parties notice of the non-acceptance, (protesting previously for non-acceptance ⁴,) that they may be put on their guard ⁵. It is said, that, if the drawee accepts after all, the holder may demand that his acceptance should be of the date when the bill was first presented ⁶.

Acceptance may be made even after the term of payment fixed in the bill ⁷, and after a prior refusal to accept ⁸, the chief object of the bill being payment of the money, without exclu-

¹ Marius, 62; Malynes, 3, 6, 1. *Per Treby, C. J.*, in *Bellasis v. Hester*, 1 Lord Raym. 281, who says that the drawer ought to be allowed the whole day by law to view the bill.

² Beawes, No. 17.

³ *Ibid.*

⁴ *V.* opinion given to this effect by Forbes, 70.

⁵ *Per Lord Ellenborough* in *Ingram v. Forster*, 2 Smith's Rep. 245. *Chambre, J.*, had previously overruled the objection of want of notice at the trial. A new trial was allowed on another ground; but Lord Ellenborough also suggested the want of notice as a proper subject of inquiry at a new trial.

⁶ *Scarlett, C. 10, R. 18.*

⁷ *Wynne v. Raikes*, 5 East, 513. In *Jackson v. Pigot*, 1 Raym. 364, and 12 Mod. 212, action was sustained on an acceptance which had been adhibited after the term of payment. In *Mitford v. Walcot*, 1 Raym. 504, an acceptance was held effectual, which had been made after the term of payment, but within the days of grace.

⁸ In *Wynne v. Raikes*, note 7, the drawees, after refusing to accept, wrote a letter, which was sustained as equivalent to acceptance.

sive reference to the term of payment ¹. Acceptance after the term of payment will bind the acceptor to pay the bill on demand. But he alone will be liable, not the drawer or prior indorsers, unless the bill has been protested for non-acceptance and non-payment, and notice of both duly given to them ².

It has been doubted ³, whether a drawee, though he has effects of the drawer in his hands, should accept after he hears of his bankruptcy, as one of the creditors ought not to be paid before another. This question is not perhaps of much importance in Scotland, since the draft, whether accepted or not, operates an assignment to the payee of the drawer's funds in the drawee's hands, when intimated to him, and, if there is no intervening diligence, will be effectual from that date, although the drawer become bankrupt before intimation, unless it is an illegal preference, under the act 1696, or otherwise. Even in that case, the transference will be effectual, unless the other creditors challenge it. It is only when the drawer's estate has been sequestrated, or otherwise attached before intimation of the draft, that his funds in the drawee's hands cannot be transferred. In that case, the drawee must not accept, and, though he did, his acceptance could not transfer the funds in prejudice of the sequestration. But farther, though there is no sequestration, the drawee would not be justified in accepting, after he knew of the bankruptcy, because his acceptance would tend to defeat the right of the other creditors to challenge the draft, whereas he is bound to do nothing that can alter the situation of either party. If he does, he may be held accessory to the illegal preference, should it be afterwards challenged. But, if he accepts the draft without knowing of the bankruptcy, he cannot be sub-

¹ Beawes, No. 224.

² In *Mitford v. Wakot*, 1 Raym. 574, it is admitted that such acceptance could scarcely found a good action against the drawer. But the doctrine stated in the text is implied in the rules of protest and notice to be afterwards explained. In *Brown v. Hume*, 14th November 1705, Morr. 1547, where the holder of an inland bill, after protesting it on the drawee's refusal to accept, had taken his acceptance, he was found entitled to recourse against the drawer, without notice. But this case would not now be followed.

³ Chitty, 314, referring to Pothier, No. 96, who refers to *Sacchia de Cambio*, § 2, gl. 5, No. 391. It is laid down by Forbes, 75, "that the bill cannot be accepted after the drawer's bankruptcy."

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jected in payment to the creditor, if the draft is set aside, as his acceptance binds him only in terms of it. This point is doubted by a learned author¹; but it seems to be supported, though not finally settled, by a decision which he cites. If the drawee has accepted a draft made within sixty days of the drawer's bankruptcy, while himself a creditor of the drawer, he cannot, as creditor, retract his acceptance and challenge the draft; the acceptance implying a renunciation of his challenge². The drawee is entitled to accept and pay, though the drawer should die before the bill is presented, such an order being irrevocable when in the hands of a third party. It is an absolute assignment to the payee of the drawer's funds in the drawee's hands, and takes effect so soon as intimated³.

It has been said⁴, that a drawee may get quit of his acceptance, as fraudulently obtained, if the holder is aware of the drawer's actual or approaching bankruptcy when he presents the bill, and does not inform the drawee, or sends the bill for acceptance by an extraordinary messenger, that the drawee may accept before he hears of the bankruptcy. In the ordinary case, as the acceptor is presumed to have funds of the drawer in his hands, this rule is inapplicable, because intimation of the bill assigns these funds to the holder, though it is not accepted; and, therefore, the holder being entitled to presume that the drawee has funds, will not be supposed to require fraud for procuring acceptance. But, if the holder knows that the bill is to be accepted without value, for the drawer's accommodation, his concealment of the drawer's

¹ Forbes, 84. The decision is *Durward v. Wilson*, 2d Feb. 1700.

² A contrary opinion is expressed by Pothier, No. 120; but, for the reasons mentioned in the text, it does not appear to be well founded.

³ On this subject, Chitty, 314, refers to *Tate v. Hilbort*, 2 Ves. 115-16, where the payment by a banker of a draft on him, before he knew of the banker's death, was held to be good; and *Hammonds v. Barclay*, 2 East. 227, where a factor accepting bills, under the same circumstances, for his constituent, was found entitled to credit for them. But there was a separate ground of decision in these cases, viz. that the mandate must be held to subsist, *quoad* the mandatary, so long as he is ignorant of the mandant's death. In the case stated in the text, the order in the payee's hands is irrevocable, so that he might insist on acceptance by the drawee, even though the latter was aware of the drawer's death.

⁴ Pothier, No. 118; Forbes, 83-4.

bankruptcy, actual or approaching, when he presents the bill, would probably deprive him of the benefit of acceptance, as the bill is presented by him, as well as accepted, on the understanding that the drawer is solvent, and able to indemnify the drawee for his acceptance. But such fraud would not be available against his indorsee. Farther, it would be necessary, in such a case, to establish his knowledge that the bill was drawn merely for the drawer's accommodation; and this could not be proved in Scotland, except by his writ or oath, as the bill indicates the contrary.

SECTION III.

Mode of Acceptance.

1. Signature on the bill.

In Scotland, as already shewn, no person can be bound as acceptor of a bill, unless his name as acceptor is adhibited to the bill¹. This rule forms a part of the law of Scotland regarding written obligations; and besides, the admission of summary execution on bills or notes in Scotland, without any evidence but production of the document, implies, that it must afford complete evidence in itself of the obligations of the several parties². In England, where there is no remedy on bills or notes but by action, and where evidence must be led to prove the subscriptions of parties, there was less inconvenience in admitting proof of acceptance, though extrinsic to the bill. Accordingly a verbal undertaking³, and even a

¹ *Antea*, 48, *et seq.*

² *Vide* on this subject, some remarks by Mr Bell, vol. i. 396-7. There is one apparent exception to this rule, viz. where an accepted bill has been lost; it being said that the acceptance may be proved in that case by the acceptor's oath; (Forbes, 86.) But this is an extraordinary remedy provided by equity to meet the necessity of the case. A case is even mentioned by the same author, *ibid.*, where, at the drawee's request, the person who presented the bill was called to prove the acceptance. But this case obviously forms no general rule.

³ *Lumley v. Palmer*, 2 Str. 1000, *per* Lord Hardwicke, confirmed by his Lordship as Chancellor in *Powell v. Monnier*, 1 Atk. 613, and referred to in *Julian v. Sherbrooke*, 2 Wils. 9; also taken for granted in *Sproat v. Matthews*, 1 T. R. 182; *Johnson v. Collins*, 1 East. 103; *Clark v. Cock*, 4 East. 72. *Vide* likewise *Cox v. Coleman*, cited by Bayley, 174, where a promise to accept a bill sent back was held to prove acceptance. In *Anderson v. Hick*, 3 Campb. 179, a promise made by the drawees of a bill that had been returned unaccepted, to accept it if the holders would send it back again to the counting-house, was held to be an acceptance, provided this had been done; but the plaintiff failed to prove it, and was therefore non-suited. In Buller's N. P. 270, it is said that these words, "Leave the bill, and I will accept it," constitute an acceptance. In *Robertson v. Fauntleroy*, 8 Moore, 12, a promise by an executor *de bonis non* that he would honour an order on him from the party for whom he administered, was held to be binding on him, though the drawer afterwards recalled her order, and though it was stated that the effects administered were not sufficient to pay the testator's debts. *Vide* also to the same effect, *Fairlie v. Herring*, 3 Bingham. 625.

written promise¹ by the drawees, to accept or to pay an existing bill, has been accounted an acceptance. It was even held at one time, that a promise to accept bills which had not yet been drawn, was a good acceptance of them when drawn².

This doctrine, however, has been recently doubted; it being held that such a promise could not be effectual, except with reference to a party who took the bill on the faith of it³, and being even questioned whether it was good at all as an acceptance⁴. It seems rather to be a separate agreement, which is not negotiable, but may be sued on as equivalent to acceptance by the person who relied on it⁵. Indeed, many eminent English Judges have expressed regret that any thing but a writing on the bill was ever admitted as an acceptance⁶; and, by 1 and 2 Geo. IV. c. 78, it is enacted, that no acceptance of an inland bill shall be effectual, unless made in writing on the bill, or on one of its parts, if there are more than one. It has been held⁷, that an acceptance of a blank bill stamp is effectual, under this statute, its object being to get rid of questions as to promises to accept. The words, "accepted, payable at Messrs Steven and Co.," written across a bill, without a signature, have been also held to be an ac-

¹ *Vide* *Wilkinson v. Lutwydgc*, 1 Str. 648; also *Powell v. Monnier*, 336, note 3, confirmed by *Pierson v. Dunlop*, Cowper, 573, *Clark v. Cock*, 4 East. 72, and *Wynne v. Raikes*, 5 East. 513; also by *ex parte Dyer*, 6 Ves. 9. In one case in Scotland, *Fraser's Trustee v. Campbell*, Fraser and others, 28th May 1823, 2 S. and D. 346, a party who had promised by letter to accept a bill was found liable for the amount. But this was under his separate engagement in the letter, not as acceptor.

² *Pillans v. Van Mierop*, 3 Burr. 1663, *per* the Court of King's Bench, and Lord Mansfield, C. J.; who, however, in *Pierson v. Dunlop*, Cowper, 573, restricts his opinion to the case where a third party has been induced to take the bill on the faith of such a promise.

³ *Per* Gibbs, C. J., in *Miln v. Prest*, 4 Campb. 393; 1 Holt, 181; *per* Lord Mansfield in *Pierson v. Dunlop*, note 2.

⁴ Bayley, 186-7, referring to the opinion expressed by Lord Kenyon in *Johnson v. Collins*, 1 East. 98, who says that it was carrying the established rules their utmost length to admit such a promise as an acceptance to a party who had relied upon it; *vide* also *Chitty*, 312.

⁵ *Per* Gibbs, C. J., in *Miln v. Prest*, note 2; *vide* also *Chitty*, 312-13.

⁶ *Per* Lord Kenyon in *Johnson v. Collins*, *antea*, 363, note 2, and Lord Ellenborough in *Clark v. Cock*, *ibid*.

⁷ *Leslie v. Hastings*, 2 M. and Malk. 119.

ceptance in terms of the statute¹. This enactment being general in its terms, would apply to inland bills drawn and accepted in Scotland, though the necessity of written acceptance had not been already established in our law. This doctrine has been held² in a case, where, at the same time, a bill drawn in Ireland on parties resident in London, was decided to be foreign, and beyond the reach of the statute, so to be accepted by a letter, without writing on the bill. The doctrine applicable to an acceptance in England, (in any of the ways now mentioned,) of a bill drawn in Scotland, has been already noticed. The English law as to foreign bills remains as formerly.

It has been suggested by a learned author³, that, although a written promise to accept a bill, before or after it is drawn, is not, by our law, an acceptance, yet, in the holder's hands, it is a letter of credit on the drawee for the amount; that, when the bill is drawn, the drawee's obligation is fulfilled, so that he cannot be asked to accept another draft for the same debt; and that the bill and letter referring to it operate together a complete assignment of the funds in the drawee's hands. This may be the law when the letter relates to a bill already drawn; since it then implies intimation of the draft, by which the assignment of funds is completed. But it has been decided that proof of a verbal promise to accept a bill, when tendered with this view, is incompetent⁴. It may be also doubted whether a letter promising to accept bills not yet drawn operates, when they are drawn, as complete an assignment of effects in the drawee's hands as an acceptance. It has, however, been decided, that a party who promised to accept a bill for £.500, was bound for that amount, when the bill was drawn⁵, and⁶, when a party promised to honour drafts by another, to the amount of two-thirds of the value of a ship which the latter was building, he was found liable, in

¹ *Dufour v. Oxenden*, 2 M. and Malk. 90.

² *Mahoney v. Ashlin*, 2 B. and Add. 478.

³ 1 Bell, 397.

⁴ *Cullen*, 18th June 1833, 11 S. and D. 733.

⁵ *Shepherd v. Campbell, Fraser and Co.*, 28th May 1823, 2 S. and D. 346.

⁶ *Smyth and others v. Hunter*, 20th Nov. 1830, 9 S. and D. 76.

respect of his undertaking, to a third party who had discounted such drafts, though he had made other advances to the drawer to a larger amount than the two-thirds.

It has been laid down¹, as an inference from the cases already cited, regarding the effect of signing a blank bill-stamp, in binding a person as drawer or indorser, that the subscriber would be bound as an acceptor, if the bill was afterwards addressed to him as such. The principles formerly stated, as to the effect of blank signatures, are applicable to this case². If a party accepts for a larger sum than that for which the bill was drawn, though the sum has been fraudulently increased, the loss must fall on him, not on the drawer.

2. Adoption of signature.

Although the signature of a party, as acceptor, be forged, he will be liable for its amount, if he says, on being asked, that it is his signature³, or if he has previously paid several bills, accepted in the same handwriting⁴, or even if he refrains from stating forgery, when personally cited in an action on the bill⁵, or after receiving repeated charges for payment, more especially if the alleged forger is thereby enabled to escape⁶. The mere circumstance, however, of a party whose name had been forged to a promissory-note, not answering a letter for payment, or informing the creditor of the forgery, when the forger told it to her three days after, was held not to make her liable for the amount⁷. There were other circumstances unfavourable to the creditor, who had suffered the forger to escape after he heard of the forgery. If a person gives bills to a third party as signed by him, though signed

¹ Chitty, 313.

² *Antea*, 62-3.

³ In an English case, *Cooper v. Le Blanc*, 2 Str. 1050, which was an action against the indorser of a bill, who was proved to have acknowledged his indorsement, the C. J. was inclined, notwithstanding, to have admitted direct proof of its forgery, (if there had been any,) though he refused to allow a proof by similitude of hands. But, in *Leach v. Buchanan*, 4 Esp. 226, Lord Ellenborough held that an acceptor's acknowledgment of his signature excluded him from proving that it was forged, after he had thus given currency to the bill. *Vide* also 222, note 1.

⁴ *Barber v. Gingel*, 3 Esp. 60, *per* Lord Kenyon, C. J.

⁵ *Provan v. Mackay*, 29th June 1821, 1 Shaw, 92.

⁶ *Meiklem*, 16th Nov. 1833, 12 S. D. B. 53.

⁷ *M'Arthur v. Paterson*, 3d March 1825, 3 S. and D. 607.

by another in his name, he will be liable for the amount ¹. In Scotland, the party would not be considered in these cases as an acceptor, but would be liable, on the ground of his having given a false credit to the bill ².

The only kind of acceptance which the holder of a bill is bound to take is an absolute acceptance, whereby the drawee engages to pay in terms of the bill ³. In a case, therefore, where a bill drawn on Portugal, payable "in effective, and "not in vals reals," was accepted payable in "vals denari," the bill was held not to be duly accepted, and an action was sustained on that ground against the drawer, although he offered to prove "that vals denaros was sufficient to answer "what was meant by effective," as a drawee was not entitled "to vary the acceptance from the terms of the bill, unless "they be unambiguously and unequivocally the same ⁴." The acceptor, however, will be liable on his acceptance, though not in terms of the bill, if the holder takes it.

3. Form of absolute acceptance.

No form of words is necessary to constitute an absolute acceptance, provided they express an obligation in terms of the bill. The words, "accepted," "seen ⁵," "presented ⁶," a direction to a third party to pay the bill ⁷, or even a marking

¹ *Miller v. Little*, 22d Jan. 1831, 9 S. D. B. 328.

² On this ground, in the case of *M^r Arthur v. Paterson*, 240, note 8, two of the Judges held, that, although the party sued had been liable for the debt, she could not be subjected to a summary charge on the bill. But, in *Miller v. Little*, note 1, the defender was found liable in an action on the bills, as having adopted the signatures, by delivering them as genuine.

³ *Per* Lawrence, J., in *Parker v. Gordon*, 7 East 387. *Vide* also *Gammon v. Schmoll*, 5 Taunt. 344.

⁴ *Boehm v. Garcias*, 1 Campb. 425, *per* Lord Ellenborough. See also a case of the same kind stated by Beawes, No. 265.

⁵ Pothier, No. 45, who, though he doubts whether the word "seen" should indicate any thing but presentment, states, that by mercantile usage it has acquired the force of an acceptance, and that a person who wishes to exclude this construction must write "*vue sans accepter*." But *vide* 1 Pardessus, 391, 2, and Chitty, 320 and 323.

⁶ *Cumberb. 401*, *per* Holt, C. J., who says, (and the Jury likewise declared it to be the common practice,) that the words "presented," or even a marking of the day of the month alone, was equivalent to acceptance.

⁷ In *Moor v. Whithy*, cited in Selwyn's N. P., 127, 5th edition, the words, addressed to a third party, were, "Please to pay this note, and charge it to Mr

of the date of presentment, have been all held sufficient to constitute an absolute acceptance. In a bill drawn in a colony, the same effect has been given to these words by the drawee on presentment of the bill, "Accept, and you may call for it when you like¹." But, in Scotland, such words, if employed, must be written on the bill, and the drawee's signature subjoined. The usual mode of acceptance, indeed, is to merely subscribe his name. The subscription may be written at the bottom of the bill, immediately below the drawer's name, or across it². It has been decided³, that a person writing his name on the back of a promissory-note, on which there was no indorsement, so that he could not be *in titulo* to indorse, was liable as granter; and, again⁴, a party who wrote his name on the back of a bill, which he could not effectually indorse, was held to be an acceptor. The bill was not addressed to him, but to two other parties; and, therefore, there was perhaps an objection under the stamp-law, that, as he was a new obligant, this was an obligation different from that contemplated at drawing the bill⁵. But the objection was not stated. An acceptance of a bill which has no address binds the acceptor, he being pointed out by his acceptance as the person for whom the bill was intended⁶.

When a bill is drawn payable at a certain time after sight, the date of presentment must be marked, in order to regulate the term of payment⁷. It has been found to be no objection to the genuineness of this date, that it is written in a different hand from the drawee's signature; as the date is often writ-

"Newton's account." The Court held, that it was of no consequence to the holder to what account it was to be placed:—that the order to *pay the money* was a sufficient acceptance.

¹ *Canepa v. Larios*, 2 Knapp. P. C. 277.

² *Chitty*, 320; *Gray v. Milner*, *antea*, 76, note 4.

³ *Don v. Watt*, 26th May 1812, F. C. In this case, another person had signed the note, and yet the party in question was also found liable as joint obligant with him, though the note began with the words, "I promise to pay," &c.

⁴ *Watters*, Petitioner, 7th March 1818, F. C.

⁵ *Antea*, 182, note 1.

⁶ *Gray v. Milner*, *antea*, 76, note 4.

⁷ *Beaves*, No. 266, says, that in this case *the acceptance* must be dated. But it is the date of presentment which regulates the term of payment, and there may, as already shewn, be some difference betwixt it and the date of acceptance.

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ten by a clerk, before the acceptance¹. If there is no date, the acceptance is presumed to be of the date of the bill². It has been recognised as the practice in London, when a check on bankers is presented after four o'clock, to mark it payable next day at the clearing house; which marking is accounted a good acceptance, such as the holder may safely take³. When a bill is made payable generally in London or any other large town, the holder may insist that the drawee should sub-join to his acceptance some house where it will be paid, as the holder may not otherwise know where to find him, and if he refuse, the holder should protest for non-acceptance⁴. How far such an acceptance can limit the payee's right to demand payment elsewhere, shall be afterwards considered.

The mode of acceptance necessary, when a party means in signing as agent for another, or in name of a firm, has been explained⁵. It was also explained, that, although a party has subscribed only "as cautioner," he will be liable to the holder of the bill as principal debtor⁶.

4. Implied acceptance.

The rule established in Scotland, that there can be no acceptance, without the drawee's signature to the bill, by himself or mandatary, has saved us from much discussion which has taken place in England, as to implied acceptance, and which is still applicable to foreign bills, as they do not fall under the 1 and 2 Geo. IV. c. 78. It has been decided in England, that acceptance is implied, when the drawee not only detains the bill, but, from his conduct, leads the holder to believe that he considered it as accepted⁷. But the mere

¹ In *Glossop v. Jacob*, 4 Camp. 227, 1 Stark. 70, this point was left by Lord Ellenborough, as a matter of mercantile usage, to the Jury, who found for the plaintiff, on the ground stated in the text. The objection was made by pleading that the date was not probative, so as to afford evidence that the time mentioned in the bill had elapsed from its presentment to the date of the action.

² *Antea*, 66-7, &c.

³ This was held in *Robson v. Bennett*, 2 Taunt. 358.

⁴ This was held in *Gregory v. Walcup*, Comyns, 76; and *per Holt*, C. J., in *Mitford v. Walcot*, 1 Lord Raym. 575.

⁵ *Antea*, 227-8, and 241.

⁶ *Antea*, 75.

⁷ This appears to have been the true ground of decision in *Harvey v. Martin*, 1 Campb. 425, and *Bayley*, 191, note 45, and not the mere circumstance of the drawee having obtained the bill. It appears, indeed, that in a case, *Trim-*

detention of the bill will not be held as acceptance¹, although, even in Scotland², if the drawee detained it after it was redemanded, he would be liable to any damage thence arising; for instance, if the drawer should in the mean time become bankrupt. Nor will the mere loss of a bill by the drawee or his servants infer acceptance, though it is said that, in such a case, the creditor should demand a note from him for the amount, or, on his refusal to grant it, should protest for non-acceptance and non-payment³. It has been said, that even the destruction of a bill by the drawee within the time when acceptance might be expected, will not amount to acceptance⁴, though it may subject him in trover for the bill. Its destruction, after acceptance has been refused, will undoubtedly not amount to acceptance⁵. It has been found, that a check on a banker, which was returned, in due time according to the usage of London, is not to be held as accepted, though previously cancelled by mistake⁶. It would seem that, according to this usage, no checks are cancelled but those which are intended to be paid⁷. A banker was not held to have honoured

mer v. Oddie, there cited, Lord Kenyon held, that the mere detention of the bill amounted to acceptance, and that Lord Ellenborough inclined to the same opinion. But his Lordship afterwards said, on an argument for a new trial, that, if it had not been for the defendant's strong admissions in the case as to his obligation, he would have left that question to a special jury. *Vide also Clavey v. Dolbin*, Rep. temp. Hardw. 278.

¹ This opinion was expressed by two of the Judges, Abbot, C. J., and Holroyd, J., in *Mason v. Barff*, 2 B. and A. 26. Bayley, J., appears to have rested his opinion chiefly on the circumstances of the case, from which it appeared that the defendants had acted in some measure as agents for the plaintiffs, and that the latter had good reason not to infer acceptance from the mere detention of the bills in question.

² *Forbes*, 65.

³ *Beawes*, No. 17.

⁴ *Per Bayley, J.*, in *Jeune v. Ward*, 1 B. and A. 659.

⁵ This was decided in *Jeune v. Ward*, note 4, by Abbot, Bayley and Holroyd, J., *v. Lord Ellenborough*, C. J. *Vide Bayley*, 192.

⁶ *Fernandez v. Glyn*, 1 Camp. 426, note. Lord Ellenborough is reported to have said in this case, that if the document "had been a bill sent for acceptance and accepted, no change of circumstances could have altered that fact." This point is afterwards discussed. In *Raper v. Birbeck*, 15 East. 17, the cancellation, by mistake, of the acceptance of a bill by one of the partners of a house to which it was to be presented, failing the acceptors, was found not to bind that house to payment, being held to be a mere accident, as if a blot had fallen on the paper.

⁷ As to the effect of admitting an acceptance, and that it has not been paid, *vide Leaper v. Tatten*, 16 East. 420.

a check, by taking it from a customer who desires it merely to be placed "to his account," but is held to have received it only as his agent, and was exonerated, on returning it next day¹.

It has been held, that acceptance is not to be inferred from the drawee writing that the bill "shall have attention²," or from a refusal to accept written on the bill³, unless the drawee intended it as a surprise on the party⁴, or from the drawee saying when he returned the bill, "There is your bill; it is "all right⁵." When the drawee says that he cannot accept without orders from a third party, which that party gives, desiring him to draw for the amount, his merely drawing on that party, who refuses to accept, will not infer acceptance⁶, though it seems to be implied that he would be held to have accepted if his draft were accepted and paid. Nor will acceptance be inferred from the drawee offering to pay the bill exclusive of the expense of a duplicate protest, if the holder will not deduct this expense⁷. These, and many other cases noticed by English authorities, afford a specimen of the discussions which have arisen from the doctrine of implied acceptance. In such of these cases as infer fraud or gross misconduct in the drawee, viz. where he imposes a written refusal to accept on the payee as an acceptance, or detains the bill *mala fide*; or so as to injure the payee's recourse against the other parties, or destroys it, he may be liable in Scotland to a claim of damages, but cannot be considered as an acceptor.

5. Delivery of bill.

When a bill is once accepted and issued, the acceptance is irrevocable. But it has been much discussed in England, whether a drawee may cancel his acceptance before re-delivery of the bill, or whether the creditor does not acquire a com-

¹ *Boyd v. Emmerson*, 1 Ad. and Ell. 185. *Vide also Kilsley v. Williams*, 5 B. and A. 815.

² *Rees v. Warwick*, 2 B. and A. 113.

³ *Peach v. Kay*, Bayley, 183, *per* Lord Mansfield, who states it as the opinion of all the Judges, that such a written refusal was no acceptance, when the drawee told the holder what he had written; but that, if he intended it as a surprise, it would be held an acceptance.

⁴ *Ibid.*

⁵ *Powell v. Jones*, 1 Esp. 17, *per* Lord Kenyon, C. J.

⁶ *Smith v. Nissen*, 1 T. R. 269.

⁷ *Anderson v. Heath*, 4 M. and S. 303.

plete right in it without re-delivery. In one case ¹, where an action was brought against the drawee of a bill, who had accepted it, but afterwards cut off his acceptance, and returned the bill, Lord Kenyon held, that acceptance once given cannot be revoked, and that therefore the defendant was bound. Afterwards ², when a bill had been left with the defendants for acceptance on 1st October, and, on being called for again, on 11th October, was returned by them with an acceptance nearly defaced by black ink, Lord Ellenborough held, that, in all bills, whether payable after sight or after date, an acceptance once made was irrevocable, though the bill was not delivered up, and the plaintiffs had a verdict. But, in a subsequent case ³, where the defendant had obliterated his signature as acceptor, while the bill remained in his possession, the question as to the irrevocability of his acceptance was considered by the Court of King's Bench, including Lord Ellenborough, as still open. The plaintiff was held to have barred himself from pleading the acceptance, on the ground that he had protested the bill for non-acceptance. Lord Ellenborough's opinion, that this was an open question, appears in another case ⁴, where he refers to Pothier as stating, that an acceptor may obliterate his signature at any time before parting with the bill. In that case, it was also decided, that when, after a bill has been accepted, a third party, without authority, cancels the acceptance by mistake, the holder may recover on it against any of the parties, as on a subsisting document. In Scotland, as in England, such a document might be the subject of an ordinary action, in which the circumstances attending the obliteration should be fully set forth and proved ⁵.

¹ *Trimmer v. Oddie*, 1800, cited by Bayley, 205.

² *Thornton v. Dick and others*, 4 Esp. 270.

³ *Bentinck v. Dorian*, 6 East. 199.

⁴ *Raper and others v. Birbeck*, 15 East. 17.

⁵ In a recent case, *Novelli v. Rosai*, 2 B. and Ad. 757, this doctrine was carried so far, that the indorsers of a bill in which the acceptance had been "cancelled by mistake," (and so marked immediately afterwards, as well as the acceptance renewed, but not till after parties to whom application was authorised in case of need, had refused,) were found liable in this country, in contradiction to the judgment of a foreign court, which had absolved them, (though the holder of the bill was a party also to it,) the foreign court having mistaken the law of England, in holding, that the cancellation suspended the remedy on the bill, and that, being equivalent to the giving of time, it dischar-

The question now alluded to was held to be unsettled in a more recent case ¹, where a bill which had been left with the drawee for acceptance was returned with an obliterated acceptance, but without evidence to account for the obliteration; and, in that case, the Court of King's Bench, without even hearing the drawee, decided that he could not be liable as an acceptor. This doctrine, indeed, appears to be consonant with sound principle; for acceptance, like any other contract, does not seem to be complete till communicated to the other party; and, till then, the drawee, though he has resolved to accept, may change his mind, so that his signature is merely a private marking, which he may efface at pleasure. The obliteration of his signature, if it injures the bill, may afford a claim of damages against him, but cannot make him liable as acceptor. But there does not seem to be any real injury; for the holder will have an immediate claim on it against the other parties, as on a bill of which acceptance is refused; and it may even be afterwards indorsed on their credit, though it does not seem to be fit for circulation as a bill, when the drawee has refused to accept ². The same opinion is expressed by Pothier, nearly on the grounds which have been now stated ³.

Re-delivery of the bill accepted is the most common mode by which the drawee apprises the other party of his acceptance, and thus renders it irrevocable. But any other mode of intimating it would have the same effect, though the bill should still remain with the drawee, since he would be considered, in that case, as holding it for the creditor's behoof. Accordingly, in a case ⁴, where the drawee admitted his acceptance, but retained the bill, the Court of King's Bench held that the creditor did not require to aver re-delivery, but might give him notice to produce it. But, till the accep-

ged the drawers and indorsers. Reference is made in this case to another case already noticed, (*Wilkinson v. Johnson*, *antea*, 276.) In that case, it was said that the last indorsers might have a remedy against the party causing the cancellation, for the expense which they might thereby incur in recovering from the prior indorsers. In the case in question, by the judgment of the foreign court, their remedy against these indorsers was cut off altogether.

¹ *Cox v. Troy*, 5 B. and A. 474.

² *Vide Chitty*, 337.

³ Pothier, No. 44; *vide also* Dupuy de la Serra, c. 10, p. 80.

⁴ *Smith v. M. Lure*, 5 East. 476, *antea*, 159, note 3.

tance is intimated to the creditor by delivery, or otherwise, it would seem that the drawee may cancel it at pleasure.

It is a question, Whether a drawee signing his name, but delivering the bill thus signed to a third party, with orders not to give it up till certain conditions are fulfilled, is to be held as bound by his acceptance, without regard to such conditions. This was once held¹, where a drawee having intrusted several bills thus signed to his agent, not to be given up except in certain events, but the bills having been forced from the agent by a decree of the Sheriff, the Court decided, in a reduction of the decree, and an action on the bills by the payee against the drawee, that the latter was liable absolutely by virtue of his acceptance. But the soundness of this decision may be doubted. It was said that the bill was the payee's document, which he might recover. But he must in that case have got it subject to the conditions under which the agent held it, and he does not, therefore, seem to have had more right, by virtue of the acceptance, than if the drawee had intended to erase his acceptance, but the bill had been forced from him before he could do so. If the drawee neither would say that he had accepted, nor return the bill, the creditor's remedy was to protest for non-acceptance, and bring an action for recovery of the bill. But such a protest would have excluded the plea of acceptance ; and he could not, by merely forcing back the bill, make out an acceptance which the drawee had never completed by intimation, and which a protest, the proper remedy, would have negatived. An onerous and *bona fide* holder of such a bill, however, would have had a claim on the acceptance.

¹ Campbell v. Campbell, 21st Nov. 1781, Morr. 1478.

SECTION IV.

Different Kinds of Acceptance.

1. Conditional acceptance.

Conditional acceptance, whereby the acceptor's obligation to pay is made to depend on a contingency, is admitted¹. There is a distinction between a conditional acceptance, and a bill *drawn* payable on a contingency; the radical obligation, in the former case, being absolute, as the drawer is bound, at all events, to make payment to the holder; whereas, if a note be granted, or a bill *drawn* conditionally, the whole obligation will be contingent, because the acceptance follows the tenor of the draft.

The English Reports afford numerous examples of conditional acceptance; for instance, to pay "as remitted for²," or "on account of the ship *Thetis*, when in cash, for the said "vessel's cargo³," or on condition of getting a certain house by a given term⁴, or when certain goods are sold⁵, or when certain funds come to hand⁶. Lord Stair also mentions similar examples, such as, "if provisions come betwixt and the "day," or if there are goods or bills enough on hand⁷. But an acceptance to pay, "in case the owners of the *Queen Anne* "would not," was found to be absolute as to the payees⁸; as merely implying that the acceptor should not be asked to

¹ It is recognised in the following cases: *Anderson v. Hick*, 3 Campb. 179; *Milne v. Prest*, 4 Camp. 393; *Holt, C. N. P.* 182, *per Gibbs, C. J.*; *Langston v. Corney*, 4 Camp. 176, where it was held that the plaintiff could not recover under a count as for an absolute acceptance, because the acceptance was conditional; and *Swan v. Cox*, 1 Marsh. 176, where an acceptance depending on the condition of the defendant getting possession of a house was held to be unavailing, as he had not got possession. *Vide* also *Gammon v. Schmoll*, 5 Taunt. 344, where the same principle is implied.

² *Per Lee, C. J.*, in *Banbury v. Lisett*, 2 Str. 1211.

³ *Julian v. Sherbrooke*, 2 Wils. 9.

⁴ *Swan v. Cox*, note 1.

⁵ *Smith v. Abbott*, 2 Str. 1152.

⁶ *Mendizabal v. Machado*, 6 C. and P. 218; 2 M. and Sc. 641, S. C.

⁷ i. 11. 7.

⁸ *Wilkinson v. Lutwydgc*, Str. 648.

pay till he had applied to these parties, and not depending on the condition of the payees first applying to them. It has been shewn that an acceptance "as cautioner" is deemed an absolute acceptance with reference to the holder of the bill¹. Various cases are mentioned where conditional promises to accept were recognised as acceptances when the conditions were fulfilled². But such promises cannot, under any circumstances, be accounted acceptances in Scotland. In all cases of conditional acceptance, the acceptance becomes absolute when the condition is fulfilled³. Its fulfilment must be specially averred and proved⁴. Such acceptances, therefore, in Scotland, could only be made effectual by an ordinary action, not by summary diligence.

The conditions of an acceptance will not be effectual against an onerous and *bona fide* holder of the bill, unless annexed to the acceptance. A condition in a separate writing will not be effectual, if the holder, or the person under whom he claims⁵, has got no notice of it. In one case, effect was given to a separate writing qualifying the defendant's obligation, on the express ground that the bill was not in the hands of an onerous indorsee⁶. In all questions with indorsees, the acceptor must prove that they were aware of such separate qualifications. Parole evidence of these qualifications does not seem admissible even in England⁷, and it would not be admitted in Scotland, though the holder was aware of it, to qualify an absolute written acceptance. But, when the terms of the acceptance are ambiguous, parole evidence would probably be admitted to explain them⁸.

¹ *Antea*, 75.

² *Vide* Chitty, 332, and cases there cited.

³ This is implied in *Banbury v. Lisett*, *antea*, 348, note 2, and in all the other cases already cited. Indeed, it results from the nature of the case.

⁴ *Swan v. Cox*, *antea*, 348, note 1.

⁵ Bayley, 197.

⁶ *Bowerbank v. Monteiro*, 4 Taunt. 844, *per* Gibbs, J.

⁷ *Antea*, 12.

⁸ *Per* Gibbs, C. J., in *Swan v. Cox*, *antea*, 348, note 1. In this case, a condition in the defendant's acceptance, viz. that the bill should be paid, if a certain house was given up to him at a fixed term, was held to refer to a separate contract, by which the (supposed) owner of the house had agreed to sell it to the acceptor at a certain price.

2. Acceptance payable to drawee.

It has been said ¹, that, when the drawee of a bill is creditor of the holder for its amount, he may accept it "payable to myself;" and, that if his claim is liquid, the holder cannot reject this acceptance as conditional, as the payment "to myself" is a payment to him. This may be a good defence in an action by the holder against the drawee for non-acceptance; but it cannot prevent the holder from protesting the bill, and pursuing his recourse against the other parties, in respect that there is not an acceptance in terms of the bill. Nor can it hinder the holder from indorsing the bill to a third party, though it may be questioned whether such an indorsation would carry the drawer's funds in the drawee's hands, or whether the latter, in the event of his having a counter claim against the drawer, would not be entitled to plead compensation or retention. It has been said, that if the funds in the drawee's hands have been arrested by a creditor of the holder ², he may accept "payable to the party entitled to the money." But this is no acceptance, and it would probably be wisest for him to refuse acceptance on account of the arrestment. On the other hand, he would be obliged to accept, if the bill was afterwards presented to him by an indorsee, as the fund is conveyed away by the indorsement from the former holder.

3. Partial acceptance.

A partial acceptance engages to pay only part of the sum in the bill. Though the drawee may thus accept for less than the amount, he cannot, by accepting for more, give the holder a claim beyond it, since his right, as well as the drawee's acceptance, is limited by the bill ³. It was once maintained in England, that a partial acceptance, though it might be sued on as a separate agreement, could not found a good action *on the bill*, as the other parties might object to dividing the obligation into separate acceptances, and subjecting them to separate actions. This objection was inapplicable to the case in question, which was a partial acceptance *by the drawee*, who,

¹ Dupuys de la Serra, C. 8; Pothier, No. 47.

² Ibid.

³ Pardessus, No. 269.

being presumed to do so as the drawer's debtor, could have no recourse on the bill against any of the other parties, so that they could not be liable to more than one action by the holder on non-acceptance or non-payment. On the other hand, partial acceptances, *supra* protest, for the honour of the drawer, or any other party, are not made according to the tenor of the bill, but are authorised by custom, to save the credit of the previous parties, who cannot therefore object to a number of claims of recourse against them by the acceptors, because such claims might be extinguished by their paying the bill, for which they are liable, from its non-payment by the drawee. Such a partial acceptance, therefore, whether given by the drawee, or, on his refusal, by an acceptor *supra* protest, authorises action or diligence on the bill ¹.

4. Varying acceptance.

An acceptance may vary from the tenor of the bill, as to time ², or place of payment ³, or mode of payment, as, for instance, by engaging to pay half in money and half in bills ⁴. The bill itself must, in its original constitution, be payable in money, and it always remains so with reference to the drawer and the other parties. But mercantile usage has introduced the limitation now mentioned as to the acceptance.

5. Holder's duty as to such acceptances.

When the drawee offers an acceptance varying from the tenor of the bill, whether as conditional, partial or otherwise, the holder may refuse it if he pleases, and protest for non-

¹ The case referred to in the text, where the objection above mentioned was repelled, after full discussion, is *Wegerstoffe v. Keene*, 1 Str. 214. The same kind of acceptance is recognised by Molloy, No. 20. of his title on Bills, Marius, 68, and Pothier, No. 48.

² Molloy, No. 28, *h. l.*, and *Price v. Shute*, mentioned by him in the same place, in which, according to the construction of it by Buller, J., in *Master v. Miller*, 4 T. R. 320, effect was given to such an acceptance in an action against the acceptor. *Vide* also *Walker v. Atwood*, 11 Mod. 190, where an acceptance of a bill which had no term of payment, promising to pay at a certain future day, was held good in an action against the acceptor, although he objected that this was not an acceptance in terms of the bill; because, from specifying no term of payment, it must be held to have been payable at sight.

³ *Vide* *Sebag v. Abithol*, 4 M. and S. 466, and *Cowie v. Halsell*, 4 B. and A. 198-9, *antea*, 182, note 2, *per* Abbot, C. J. But the effect of an acceptance, payable at a particular place, shall be afterwards discussed.

⁴ Molloy, No. 20, *h. l.*, referring to *Petit v. Benson*, *Cumberb.* 474.

acceptance¹. In a case² where a bill was drawn on two parties, one of whom accepted simply, and the other *for his half*, the Court of Session decided that the latter “ought to have “accepted simply, and that he was liable *in solidum*.” The ground of this decision probably was, that he was liable at any rate *in solidum*, as a copartner of the other acceptor. But it does not appear consistent with principle to hold his acceptance *for half* a sufficient ground for subjecting him to the whole. The utmost that the holder could do in such a case, was, to protest the bill, as to the residue, for non-acceptance. On the other hand, if the holder takes a limited acceptance, it will regulate his claim against the drawee³. As to the other parties, he will lose all claim against them, if he takes an acceptance varying from the bill, without giving them immediate notice⁴. When the drawee accepts only for part of the bill, the holder may safely take the acceptance; but, to preserve his recourse, he must protest for non-acceptance and non-payment as to the residue⁵. If an acceptance, though for the whole sum, is made under some condition, or under a limitation as to time, there is a doubt whether the holder taking it, will preserve his recourse by notification to the other parties; or whether he ought not likewise to protest for non-acceptance, so far as the acceptance does not agree with the tenor of the bill, and thereupon take it; or whether he can preserve his recourse, without protesting generally for non-acceptance, and thus rejecting the acceptance altogether. This last opinion is held by Lord Stair⁶. But it would appear that the payee may safely take such an acceptance as well as a partial acceptance. He must protest, however, for non-acceptance, so far as the acceptance is not in terms of the bill, since the drawee disobeys the mandate in the bill, when he accepts under a condition not authorised by it, as much as when he accepts only for part of it⁷.

¹ *Per* Lord Ellenborough in *Boehm v. Garcias*, *antea*, 340, note 4.

² *Naughton v. Ritchie*, 10th Dec. 1712, *Morr.* 1490-1.

³ *Per* Lawrence, J., in *Parker v. Gordon*, 7 East. 385; *Gammon v. Schmoll*, 5 Taunt. 344; and *per* Bayley, J., in *Sebag v. Abithol*, 4 M. and S. 466.

⁴ *Bayley*, 253-4, *per* Bayley, J. in *Sebag v. Abithol*, note 3. The same doctrine is taken for granted in *Paton v. Winter*, 1 Taunt. 422-3.

⁵ *Marius*, 68 and 86.

⁶ *i.* 11. 7.

⁷ *Marius*, 88, states, that when the drawee accepts, payable at a longer time

If the holder means to avail himself of the limited acceptance, he must set it forth specially in his notice and protest, since any act which indicates that he does not acquiesce in it, will, as to the drawee, cut him off from the benefit of it ¹.

6. Drawee's obligation to accept.

A question has been raised ², How far a debtor of the drawer is bound to accept bills drawn on him to the amount of the debt, under the penalty of damages for non-acceptance? If he has agreed to accept, he is bound to do so, whether he is the drawer's debtor or not. But, if not, the only reason why he can be bound to accept, is, that there are in his hands, not merely effects of the drawer, but cash, with which he can pay the bill when due. On this principle, it has been shewn ³, that an unaccepted bill cannot operate an assignment to the payee of the drawer's funds in his hands, unless they are in cash at the date of the presentment and protest. The drawer's debtor, therefore, cannot be bound to accept a bill even for a sum not exceeding his debt, unless it is made payable on a day at or after the expiration of his stipulated term of credit, as it is only then that he has cash *belonging to the drawer* to meet the bill ⁴. Under this condition, he seems bound to accept, as it can make no difference to him whether he pays the drawer himself, or his assignee. The assignment, as already shewn, is completed, without his consent, by the draft and protest for non-acceptance; and, though

than that allowed in the bill, the holder may take the acceptance, and must yet protest for non-acceptance, in so far as the acceptance is not conformable with the bill. The same principle seems applicable to every other kind of variation in the acceptance. Bayley, 253-4, and Chitty, 329, speak generally of notice of the conditional nature of the acceptance, but do not mention the necessity of a protest.

¹ In *Sproat v. Matthews*, 1 T. R. 182, the holder was found to have waived the benefit of what was held to be a conditional acceptance, by protesting the bill generally for non-acceptance. The same doctrine, as to the effect of a protest for non-acceptance in precluding the party protesting from pleading a previous acceptance, was held in *Bentinck v. Dorrien*, 6 East. 199.

² Glen, 126, 2d edition.

³ *Stewart v. Ewing*, *competing*, 176, note 4.

⁴ In an early case, *Russell v. Learmont*, 22d Feb. 1671, 2 Brow. Suppl. 523, a drawee was found not to be liable for exchange and other expenses for not accepting, as there was only a disputed claim by the drawer against him.

he would, but for acceptance, be liable only to an ordinary action by the payee, instead of summary diligence, he cannot plead such a distinction as a legal excuse for not accepting, when he is bound, in all events, to pay the money, without either action or diligence.

SECTION V.

Effect of Acceptance.

1. Assignment of funds.

Acceptance operates an assignment to the payee of the drawer's funds in the drawee's hands, to the amount of the bill. The holder of a bill posterior in date, if first accepted, will be preferred on these funds to the holder of a prior bill, when neither accepted nor presented till after the other bill ¹. The date of presentment, as already shewn, is the criterion of preference ².

2. Acceptor principal debtor.

It has been shewn ³, that the drawee is presumed, from acceptance, to have value belonging to the drawer in his hands, whether the bill contains the words "value received" or not, and whether it is made payable to the drawer or to a third party. It is from this presumption, that the drawee acceptor becomes liable primarily as debtor, and that the drawer and indorsers are liable only on his failure to pay. On this principle it was decided ⁴, that a bill with a general receipt for payment on the back of it, though in the hands of the drawer's assignee, must be presumed to have been paid with the funds

¹ Scarlett, C. 42. R. 36; Forbes, 165.

² *Antea*, 79, 80.

³ 86, *et seq.* The English authorities on the subject are cited, 89, note 7.

⁴ *Ferguson v. Young*, 29th Nov. 1793, Morr. 1488. The same principle was followed subsequently in *Webster v. Thomas*, 15th Jan. 1819, F. C., being an action brought by a party against his brother-in-law, the grantor of a promissory-note, for its amount, as having been paid by him on the defender's account. In evidence of this the pursuer produced the note retired; but as the receipt for payment was in general terms, the Court held the presumption to be that it was retired with the funds of the defender, the proper debtor. They likewise took into account that the note had been paid on 17th August 1809, whereas the pursuer did not bring his action till 1816. But the general rule now mentioned appears sufficient of itself to have warranted the interlocutor. The same rule was recently recognised in *Jackson v. Williamson*, 9th Dec. 1825, F. C., and 4 S. and D. 292. In *Soutars v. Soutar*, 29th June 1827, 5 S. and D. 876, this presumption, arising from a general receipt for a partial payment, was held to be redargued by a receipt for the whole amount of the bill, given when it was retired, which bore that the drawer had retired it.

of the acceptor, as primary debtor ; it being held that, if a party not primarily liable had paid it, he would have taken a special receipt to himself. It has been also decided ¹, that, when one of four co-acceptors of a bill paid part of it, (the fourth having become bankrupt,) he was entitled to claim a third of the sum paid from each of the other two, but only a third, as they were both solvent, and that an averment that he was the party accommodated by their signatures could not be proved except by his writ or oath. A similar principle was adopted in another case, where one of several acceptors, having paid the drawer, after he had been ranked for a composition on the estate of another acceptor, was found entitled to sue that acceptor for the composition to the extent of his proportional relief, without regard to an allegation that another acceptor had got the contents of the bill ². The same doctrine has been held in England, under these limitations, viz. that the bill must be proved to have been in circulation, otherwise it may not have been a subsisting document of debt, and that the receipt must be in the handwriting of some person entitled to receive payment, either as payee or indorsee ³. It has been held ⁴, however, in England, that such a receipt may be explained, by shewing, that the money was paid, not by or for the acceptor, but as purchase-money by a party who wished to acquire the bill, and that, this being proved, the bill, notwithstanding the receipt, was still negotiable. On the other hand, it has been held in Scotland, regarding a bill with a general receipt, found in the repositories of the debtor's agent after his death, that the presumption of payment by the debtor thence arising, was redargued by letters from him to his agent, importing that the latter advanced the money ⁵. In bills admitted to be accommodation-bills, which are drawn without real value in the drawee's hands, to raise money by discounting them, the acceptor will be presumed to have received the money, as the value in re-

¹ Laing v. Anderson, 27th June 1827, 5 S. D. 851.

² Russell v. Douglas, 10th Dec. 1830, 9 S. D. B. 163.

³ Scholey v. Walsby, Peake, 25, per Lord Kenyon, compared with Pfiel v. Van Battenburg, 2 Campb. 439.

⁴ Graves v. Key, 3 B. and Ad. 313.

⁵ Ewing v. Earl of Strathmore, 13th Dec. 1825, 4 S. and D. 310.

spect of which he accepted ; and this principle cannot be redargued in Scotland, except by the drawer's writ or oath¹. In a case², where a blank bill was accepted by one person for the accommodation of another, and also by the party accommodated, and was filled up by a third party, who likewise drew it in his own favour, (he having given value for it, however, to the party accommodated,) the drawer's knowledge, that it was an accommodation-bill, was held not to deprive him of the privileges of an onerous holder. It was presumable that he had given value for it, unless the contrary had been established by his writ or oath.

In another case³, where a debtor got a promissory-note from a third party payable to his creditor, and then gave it to him, without indorsing it, guaranteeing its payment by a separate letter, it was held, (although the payee admitted on oath that he gave no value directly to the granter of the note,) that he was, notwithstanding, entitled, as an onerous holder, to recover from him. A similar decision was afterwards given on the authority of this case, under nearly similar circumstances⁴.

In England, a proof at large is admissible to shew that a bill was accepted, in whole or in part, without value⁵. Even in Scotland, where a bill, though made payable to a certain person, and found in his possession, is alleged to have been deposited with him for a special purpose, as to retire a former bill or note, this fact, as it relates, not to his title *ex facie* of the bill, but to the mode in which it came into his posses-

¹ This was found in *Wallaces v. Barrie*, 29th Dec. 1793, *Morr.* 1483, and was held in *Berry v. Murdoch*, 15th Feb. 1822, 1 *Shaw*, 328, *antea*, 91, note 1. The same doctrine was also recognised in an action by the drawer against the acceptors, admitting that the bill had been signed to raise money for a third party, and that drawer and acceptors were bound each to the extent of one-third, it being decided that, except in so far as the drawer's liability was admitted, the acceptors must be liable, unless they disprove the drawer's claim by his writ or oath ; *Macgregor v. Gibson*, 19th Feb. 1831, 9 *S. D. B.* 483. *Vide also Percival v. Frampton*, 3 *Dowl. P. C.* 748, where the same principle was enforced as to the presumption of value between the maker of a note and the holders, in an action by them against a person who was said to have indorsed it for the maker's accommodation.

² *Smith v. Taylor*, 27th Feb. 1824, 2 *S. and D.* 755, *F. C.*

³ *Dirom v. Boyd*, 7th June 1827, 5 *S. and D.* 773.

⁴ *Allan v. Galli*, 5th June 1829, 7 *Sh. and D.* 706, *F. C.*

⁵ *Darnell v. Williams*, 2 *Stark.* 166.

sion, may be proved by any competent evidence¹. It has been already shewn that want of value, whether proved in the mode admitted by our law or by that of England, is not available against a third party holding the bill, even though he knew, when he took it, that it had been accepted without value, unless it is proved by his writ or oath that he got it without value, or that it was accepted for his accommodation². The purpose of granting such bills is to raise money by discounting them with third parties, and, therefore, it is no defence against such parties that they knew the bills to be granted without value. It has been even decided³, that, when a party, for whose accommodation a bill was accepted, sends it to his bankers as a security generally for *their account*, they knowing that it is an accommodation-bill, and the balance on their account is in his favour when the bill falls due, and afterwards, so that the lien then ceases to attach; yet, if the acceptor did not then withdraw the bill, and the balance afterwards turned against the party who remitted it, the banker's lien would again become effectual against the bill. But, when a party accepted a bill for the accommodation of two partners, and one of them having also considerable separate funds as executor for an estate, employed them in discounting such bills, depositing these bills in the executry box, it was decided, on the bankruptcy of the partners, that the executors were not *bona fide* holders of the bills without notice, and could not recover more (from the acceptor,) than the partners could have done, if they had not become bankrupt⁴. Bankers, to whom a bill has been indorsed without value, are liable to the same exceptions as the indorser⁵. It has been also decided⁶, that, when bills have been accepted for the accommodation of a partner in a firm, and on an undertaking by him to provide for them when they become due, he cannot sue on them, either alone, or with his copartners.

There are other cases relating to the claims of third parties

¹ *Anderson v. Geddes's Trustees*, 16th Jan. 1824, 2 S. and D. 620.

² *Antea*, 89, *et seq.*, and 105. *Vide also Marshall ex parte*, 1 Atk. 131, and opinion of the Court in *French v. Archer*, 3 Dowl. P. C. 180.

³ *Attwood v. Crowdie*, 1 Stark. 483.

⁴ *v. Adams*, 1 Younge, (Exch.) 117.

⁵ *Harby v. Wall*, 2 Starkie, 195.

⁶ *Sparrow v. Chisman*, 4 M. and R. 206.

on bills known by them to be accommodation-bills, which have been already discussed ¹.

3. Acceptance by executors.

It follows from what has been already stated ², that acceptance by an executor, even on account of a debt of the deceased, is an admission of funds, and will subject him personally, though there should be no funds. It has been also decided, that a factor who accepted, subject only to prior acceptances made for the drawer, could not refuse payment to a third party, who was payee, on account of a balance due by the drawer to himself ³.

4. Admission of drawer's signature.

Acceptance is an admission of the drawer's signature, and precludes the acceptor from afterwards pleading against a *bona fide* holder, that it was forged ⁴. But his acceptance does not preclude him from challenging any of the indorsements, since he is supposed, when he accepts, to look only at the drawer's signature, his account with him being alone affected by the acceptance ⁵. But, it cannot be pleaded, that

¹ *Antea*, 104, *et seq.*

² *Antea*, 230.

³ *Maber v. Massias*, Bl. 1072.

⁴ In *Price v. Neal*, 3 Burr. 1354, two bills being presented by an onerous holder to the drawee, one of which he paid without accepting, and the other he had both accepted and paid; and he having afterwards brought an action to recover the money from the holder, on the ground that the drawer's signature was forged, the Court of K. B. dismissed the action, holding, that he ought to have ascertained the genuineness of the drawer's signature before accepting or paying, and that having given a credit to both bills, by paying the first, and accepting and paying the second, he, and not the defendant, must bear the loss. In two old cases, *Wilkinson v. Lutwydye*, 1 Str. 648, and *Jenys v. Fowler*, 2 Str. 946, which were actions by an indorsee against the acceptor, the acceptance was considered as at least *prima facie* evidence of the drawer's signature. In the first case, it seems to have been held, that the acceptor might, notwithstanding, lead evidence against this signature; but, in the last case, it was held, that his acceptance precluded this, as he had thereby given the bill credit with the indorsee. Similar doctrine was laid down by Buller, J., in *Smith v. Chester*, 1 T. R. 655, and by Dampier, J., in *Bass v. Clive*, 4 M. and S. 15. In this last case, an objection, that a bill had been drawn by E. Needham and Co., whereas there was only one person so trading, was held to be excluded *quoad* the defendants, by their having accepted the bill thus drawn, which was made payable to "our order," i. e. to the order of the drawers. This question, which appears thus to be nearly set at rest in England, is still the subject of debate in France. *Vide Pardessus*, No. 267-8.

⁵ This was the doctrine held by the Court of King's Bench in *Smith v.*

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an acceptor was not bound to notice the condition annexed to an indorsement; for ¹, when a person accepts a bill after a conditional indorsement, and pays it to an indorsee of this conditional indorsee, while the condition of the first indorsement is unfulfilled, he is liable in second payment to the first indorser, being bound to look at the conditional indorsement as a limitation *ex facie* of the bill, in the title of the party claiming payment.

When the drawee believes that he has already accepted a bill of the same tenor with that presented to him, he should refuse acceptance, or limit his acceptance by the condition that it shall be null, if he has previously accepted another such bill ². This limitation, to be effectual against every holder of the bill, must be subjoined to the acceptance, but will be effectual against the party presenting the bill, even when expressed separately in a protest.

The different kinds of obligation, resulting from absolute and from limited acceptance respectively, have been already explained ³.

Chester, cited note 3. *Vide* Bayley, 464, note 4. The contrary, indeed, appears to have been held by Lord Ellenborough in *Jones v. Radford*, 1 Campb. 83, note, where his Lordship found, that an acceptor was precluded from challenging the regularity of an indorsement, as he had acknowledged it by his acceptance. But it may be doubted, whether this judgment at *Nisi Prius* can be opposed to the previous decision, which appears, besides, to be well founded in principle. It has been decided, however, that, when the signature of the drawer and that of the indorser are in the same handwriting, and the names fictitious, or, at least, not proved to be real, the admission by acceptance of the drawer's signature implies also an admission of the indorsement. *Cooper v. Meyer*, 10 B. and Cr. 469.

¹ *Robertson v. Kensington*, *antea*, 275, note 5.

² *Forbes*, 85-6; *Scarlett*, C. 10, R. 34.

³ *Antea*, 340, 348, *et seq*

SECTION VI.

Discharge of Acceptor.

The acceptor's liability cannot, in general, be discharged except by payment, by himself or the drawer, or by release¹. Besides, it has been seen², that any nullity affecting an acceptance, according to the law of the country where it was made, or was to be performed, will prevent it from being enforced even in this country.

Payment, and its effect in discharging the acceptor, shall be discussed in the next chapter.

At present we shall consider the other mode of discharging him, viz.

1. Release.

Such release must be granted by the holder of the bill, who, being the person entitled to enforce payment, can alone renounce it. It may be either express or implied, or in law language, a release *rebus ipsis et factis*.

1. Express.

By the law of Scotland, no express discharge of a bill or note is valid, unless granted by the holder in writing; as obligations constituted by writing cannot be extinguished without writing³. A verbal discharge, therefore, will not be effectual, as in England⁴. A written discharge may be on

¹ Marius, 85. *Bacon v. Searles*, 1 H. Bl. 186, illustrates the effect of payment, even by the drawer, in discharging the acceptor; an indorsee, who had been partly paid by the drawer, being there found not entitled to recover from the acceptor, except for the residue. It was said by Lord Loughborough, C. J., that the drawer, by paying the bill, releases the acceptor from his undertaking, and that, if the latter should pay over again, the drawer would be entitled to recover from him the money paid as part of his funds which he should not have given up.

The general doctrine, that the acceptor can be discharged only by payment or release, is laid down by Mansfield, C. J., in *Fentum v. Pocock*, 5 Taunt. 192, 1 Marsh. 14-17.

² *Burrows v. Jemimo*, *antea*, 156, note 1.

³ *Tait on Evidence*, 320, *et seq.*

⁴ A discharge of this kind, but accompanied by other circumstances, received effect in *Black v. Peel*, cited in 1 Douglas, 248.9. The same f

the bill, or separate from it. But the acceptor is not secure, unless it is written on the bill, or unless he gets up the bill, since it may otherwise be indorsed to a third party, who, as already shewn¹, will not be affected by payments that do not appear *ex facie* of the bill. It has been also shewn², that a general receipt on the bill for payment will found a presumption that the payment was made from the acceptor's funds, though the bill is in the hands of another party. Farther, it has been decided³, that, when a bill accepted by two debtors is found in the custody of one of them with a blank indorsation, the presumption is, that both contributed equally to payment of it.

It has been held⁴ no defence to the drawer of a bill against an action by indorsees, that the debt was extinguished by bill transactions between the pursuers and the acceptor, on which the former were his debtors, no allegation of specific payments having been made, or written evidence adduced to counteract the presumption arising from the bill.

2. Implied release.

Such conduct by the holder, as can only be accounted for by his having released the acceptor, may be proved by any sufficient evidence, and will constitute a discharge *rebus ipsis et factis*. It is difficult to state, *a priori*, what circumstances will thus amount to a discharge. The holder's delay to claim against the acceptor for less than the period of the sexennial prescription will not, in itself, discharge him. The effect of delay to enforce the debt for this whole period shall be considered in the Chapter on Prescription.

The facts stated in some of the English cases would probably be held sufficient in Scotland to infer a discharge. Thus⁵, an acceptor was found to be discharged by the holder writing in his bill-book that the acceptance was "at an end," and keeping the bill for three years afterwards without suing

doctrine was assumed in *Whatley v. Tricker*, 1 Campb. 35, and *Parker v. Leigh*, 2 Stark. 229; in which cases, however, it being left to the jury to say whether the words used imported an unconditional renunciation of the plaintiff's claim against the acceptor, they found for the former.

¹ *Antea*, 281, *et seq.*

² *Antea*, 355.

³ *Campbell v. Cockburn*, 7th Dec. 1728, Morr. 11534.

⁴ *Henderson v. Elliot and Foster*, 20th May 1824, 3 S. and D. 30.

⁵ *Walpole v. Pultney*, cited 1 Douglas, 248.

him. In another case¹, the acceptor was discharged by the circumstance of the payee, after getting a partial payment from the drawer, taking a written promise from him on the bill to pay the residue, and thereafter making no demand on the acceptor for three years. Again², where the defendants were alleged to have accepted bills on the security of a consignment of tobacco made to them to be sold on commission, and which they had no inducement to accept, but the commission on the sales, the holder was found to have discharged them, supposing that they had accepted, by agreeing, in a written memorandum, to take the consignment off their hands, and sell it at his own risk, for payment *pro tanto* of the bills. These cases would probably have been held, in Scotland, to infer a discharge. But it has been found, that an acceptor was not discharged, by the circumstance of the holder, who learned only after the bill became due that it was an accommodation-bill, having applied to the drawer for payment, and allowed several years to elapse without asking it from the acceptor³, or by his offering to take the drawee's affidavit that his acceptance was a forgery, (the affidavit not having been sworn, which Lord Kenyon said would have been sufficient, but only drawn and engrossed⁴;) or by his giving time to the drawer⁵, or by his taking payment from a debtor of the drawer, upon a receipt on the bill, and on condition of giving him his name in an action against the acceptor, combined with the circumstance of this party telling the acceptor that he would not be troubled about the bill⁶. Such circumstances would have been insufficient also in Scotland to discharge the acceptor. On the other hand, a general discharge by the holder of a bill to the acceptor, after it fell due, though without particular notice of the bill, or a discharge with reference to a series of transactions of which the bill formed a part, would be held to discharge the acceptor. A general release by the

¹ *Ellis v. Gallindo*, cited 1 Douglass, 249.

² *Mason v. Hunt*, 1 Doug. 297.

³ *Dingwall v. Dunster*, 1 Doug. 247. A similar decision was given in *Farquhar v. Southey*, 2 C. and Pay. 497; 1 M. and Malk. 14.

⁴ *Stevens v. Thacker*, Peake's C. N. P. 187.

⁵ *Ragget v. Azmore*, 4 Taunt. 730.

⁶ *Adams v. Gregg*, 2 Stark. 531.

drawer even after he has transferred his right in the bill, will discharge all his ground of action against the acceptor from being afterwards obliged to pay the bill, such cause of action having arisen previous to the discharge, as it draws back to the date of acceptance¹. But such a release will not discharge an acceptance granted after its date, though the bill was drawn previous to it, since the acceptance was not a subsisting debt at the time of the release². In a case where the defendant's creditors, and, among others, the payee of the bill sued on, of which the defendant was acceptor, had executed a general release, on having a certain composition secured by promissory-notes, and by the assignment of certain debts, it was held that the defendant was bound to tender the notes, not the creditors to apply for them, and that, therefore, as there was no evidence of tender, the release did not exclude an action on the original bill³. The payee's appointing the maker of a note, or acceptor of a bill, his executor, has been held to be a release⁴.

3. Discharge and indemnity of accommodation acceptors.

It was once decided by Lord Ellenborough at *Nisi Prius*, that, when the holder of a bill knew that it was accepted for the drawer's accommodation, he lost his claim against the defendant, (acceptor,) by giving the drawer time, after a partial payment, to pay the balance, the case being held the same, with regard to him, as if the bill had been drawn by the defendant, and accepted by the drawer⁵. But this doctrine was

¹ Per Lord Ellenborough in *Scott v. Lifford*, 1 Campb. 246.

² *Driggs v. Netter*, 1 Lord Raym. 65.

³ *Cranley v. Hilary*, 2 M. and S. 120. Lord Ellenborough appears to have adopted a different rule at *Nisi Prius*, in the previous case of *Boothby v. Sowden*, 3 Camp. 175, where the creditors of the defendant, who was acceptor of the bill sued on, having agreed to take notes for their claims at certain fixed periods, his Lordship held that the plaintiffs could not resort to their original remedy, (the bill,) unless they shewed that the defendants had broken this agreement, thus not holding that the defendants were bound to prove any tender of the notes. But, in the foregoing case, his Lordship, though he held that this decision might be justified by peculiar circumstances, admitted, that if there was any thing wrong in it, it must be corrected. The subsequent decision must, therefore, be held to overrule it, in so far as it was contrary to the rule now laid down.

⁴ *Freakly v. Fox*, 9 B. and Cr. 139.

⁵ *Laxton v. Peat*, 2 Camp. 186-7. In the subsequent case of *Colloit v. Haigh*, 3 Campb. 281, Lord Ellenborough decided, that the holder of an accommoda-

repeatedly questioned in subsequent cases¹; and, at last, it was unanimously overruled by the Court of Common Pleas², who found that an acceptor is always primary debtor with reference to the holder, whether the latter knew the bill to be accepted for the drawer's accommodation or not. The principle of this doctrine, as applied to accommodation-bills, appears to be, that the holder is entitled to rely on the different obligants, according to the several characters in which they sign the bill, and consequently to regard the acceptor as primary debtor. It appears, indeed, to have been held in a subsequent case at *Nisi Prius*³, that in such a case the drawer is to be regarded as principal, and that therefore a discharge to him will release the acceptor, who is only a surety. But this doctrine was only incidentally laid down, and the previous decision seems entitled to more weight. The same doctrine has since been confirmed. It was alluded to in a case⁴, where

tion-bill had not lost his recourse against the drawer by giving indulgence to the acceptor, holding that the drawer could not suffer here for want of notice, as he had no funds to withdraw from the acceptor. But it does not, therefore, follow that the holder, from knowing the bill to be accepted for the drawer's accommodation, loses that right which the structure of the bill gives him of treating the acceptor as primary debtor to him, whatever may be his relation and that of the drawer *inter se*.

¹ *Per* Gibbs, J., in *Kerrison v. Cook*, 3 Campb. 362, and in *Ragget v. Axmore*, 4 Taunt. 730, *per* Mansfield, C. J., who says, that, except in "the case" cited in *Campbell*, (*Laxton v. Peat*.) it never was known that any thing passing between other parties could discharge an acceptor." Lord Ellenborough himself appears to have acted on a different principle in *Mallet v. Thomson*, 5 Esp. 178, being an action by the indorsee against the maker of a promissory-note, which, however, the plaintiff knew to have been made for the payee's accommodation. Yet Lord Ellenborough held, that an agreement by the plaintiff not to molest the payee, though, according to the principle of *Laxton v. Peat*, he was the principal party, did not discharge his claim against the maker, seeing the latter's claim of recourse against the payee was a matter distinct from this agreement, and not affected by it.

² *Fentum v. Pocock*, 1 Marsh. 14-17, 5 Taunt. 192. It appears that, in this case, the holder did not know, till after the term of payment, that the bill was accepted for the drawer's accommodation. But, even according to Marshall's report, the Court expressed the general opinion mentioned in the text; and according to Taunton's report, they decided the case expressly on that ground.

³ *Vide* an opinion given by the Lord Chancellor in conformity with this doctrine, in *Bank of Ireland v. Beresford*, 6 Dow's Appeal Cases, 237.

⁴ *Adams v. Gregg*, 2 Stark. 531.

⁵ *Price v. Edmonds*, 10 B. and Cr. 578,

one of two joint obligants in a note, maintaining that he was surety for the other, pleaded that he was released, because the plaintiff had given time to the other obligant, the Court being inclined to hold, that the plaintiff was a principal, and could not be released even by giving time, though they decided, that, under the circumstances, no time had been given. It has been also held¹, that the circumstance of the drawer of a bill, accepted for his accommodation, paying part of it to the indorsee, and giving him a new bill for the balance, but without getting up the former bill, did not discharge the other bill, or release the acceptor. There was here no giving of time on the old bill, but, although there had, and though the holder had known that the bill was an accommodation, this, according to the cases already noticed, would have made no difference. In another case², where the holder of an accommodation-bill did not know, when he took it, that it had been accepted for the drawer's accommodation, but was told afterwards, and thereafter made an agreement with the drawer's assignees, under which he discharged the drawer, on obtaining a certain assignment, &c. he was found, notwithstanding, to have a good action against the acceptor. The authority of a previous decision³ was here disputed, on the ground of a dictum of Lord Eldon⁴, when he decided against that case, and reference was also made to another case⁵, where the Court had waived the point. But, on the other hand, reference was made to another case⁶, where the doctrine now stated was confirmed, although the holder of a note knew all along that it had been stated as a security, and, on the whole, the Court held that the acceptor was not discharged.

When a person accepts bills for the accommodation of another, he ought to take a writing of some kind from the party accommodated, setting forth the fact, or a cross bill, that he may rank for the full sum on the other party's estate, in case of his bankruptcy. In Scotland, the presump-

¹ Rolf v. Wyatt, 5 C. and Pay. 181.

² Harrison v. Courtauld, 3 B. and Ad. 36.

³ Fentum v. Pocock, 365, note 2.

⁴ Bank of England v. Beresford, 6 Dow, 237, and Glendinning *ex parte*, 1 Buck. B. C. 517.

⁵ Farquhar v. Southey, 363, note 3.

⁶ Nichols v. Norris, 2 B. and Ad. 41, note.

tion from his acceptance, that he has funds of the drawer to the amount of the bill, cannot be redargued unless by the drawer's writ or oath. The accommodation being thus proved, the drawer will be bound to indemnify him, but not otherwise¹. The extent of claims under this obligation of indemnity shall be afterwards considered in the chapter on action and diligence. The acceptor will be also entitled to retain money belonging to the drawer, which has come lawfully into his hands, till the bill which he has accepted for the latter's accommodation be paid, or till he is secured against it². This rule has been held applicable, though the accommodation-bill had incurred the statute of limitations, when the principal debtor admitted that it was still outstanding³. In Scotland, the sexennial prescription is held to extinguish the bill or note; and though the acknowledgment of the proper debtor, by writ or oath, might, notwithstanding, keep up the debt *against him*, it could not create a claim against an accommodation-acceptor. It shall be afterwards explained under what circumstances such an acceptor's acknowledgment could be effectual against himself.

If the acceptor of a bill indorses another bill to the holder in satisfaction of his liability, he will be discharged by the holder's failure to notify to him the non-payment of this bill⁴; but not, if he has given the second bill, without indorsing it, merely as a collateral security for payment of the first⁵.

¹ In England, the general obligation of the party accommodated to indemnify the acceptor, was admitted in *Young v. Hockley*, 3 Wils. 346; the Court deciding also, in that case, that the obligation to indemnify did not arise till the acceptor had paid the bill, and that, therefore, it did not fall under the certificate granted to the debtor on a commission of bankruptcy which was issued before the date of that payment. This last point was likewise decided in *Chilton v. Whiffin*, 3 Wils. 13; and in *Yallop v. Ebers*, 1 B. and Ad. 698.

² This principle was admitted by Lord Ellenborough in *Madden v. Kemperster*, 1 Campb. 12, although the acceptors were refused the benefit of it, as they had obtained the money which they wished to retain from the agent of the party accommodated, by a false statement, that he owed it to them as the balance of an account.

³ In *Morse v. Williams*, 3 Camp. 418, Lord Ellenborough, in a question with the acceptors of an accommodation-bill, who wished to retain money till they were secured of their indemnity against it, held, that the party accommodated could not plead the statute of limitations, when he admitted the bill to be still outstanding.

⁴ *Bridges v. Berry*, 3 Taunt. 129.

⁵ *Bishop v. Rowe*, 166, note 5.

Although a draft exigible only out of a particular fund, for instance, out of the pay that may fall due to the drawer by a certain day, is not good as a bill, as it depends on a contingency, it has been found, that even the drawee's verbal promise to pay as soon as he has funds, will, when he gets them, give the payee a claim to the amount of the draft, in preference to subsequent drafts; the draft, with the drawee's promise, being an appropriation of the funds *pro tanto* to him¹. Thus, a draft by a person on his debtor's executor for a sum to a third party, with the executor's promise to pay when he should be in funds, was held to be an appropriation of the fund to the payee, which remained good even after a commission of bankruptcy against the drawer². Even presentment of the draft, whether the drawee accepts or not, would, in Scotland, give the payee a complete assignment to his right in these funds when they came into the drawee's hands. The payee's right, likewise, even to a draft payable conditionally, would be assignable in Scotland, although it cannot be indorsed, as such a draft has not the privileges of a bill.

¹ *Stevens v. Hill*, 5 Esp. 247. In *De Bernales v. Fuller*, cited 14 East. 590, note *a*, where the defendants had taken a bill, in exchange for other bills, expressly to recover payment, it was held, that money paid them by the acceptor, specially on account of the bill, and which their clerk, on getting it, did not refuse so to apply, was thereby appropriated to that purpose, so that there was no lien over it for another debt due to them by the acceptor.

² *Alderson ex parte*, 1 Madd. 53; 2 Rose, B. C. 13. App. *per* Vice-Chancellor.

CHAPTER V.

OF PAYMENT.

IN the present view of our subject, it is assumed that bills or notes are to be paid, as it has been assumed that bills were to be accepted agreeably to their tenor, viz. as to acceptance, by the drawee of the bill, and in the case of payment by the acceptor of the bill or granter of the note, each of whom respectively is the proper debtor. There is another kind of payment, as well as acceptance, by a party who does not accept or pay in terms of the bill or note, but on the failure of the proper debtor, for his honour, or that of other parties. But this kind of acceptance or payment cannot be discussed till we consider the case of the parties designated by the bill or note failing to accept or pay, which shall be done under the head of Negotiation.

SECTION I.

Payment—by and to whom?

1. By whom?

A bill or note may be paid by any person liable for its amount, whether by the acceptor of the bill or granter of the note, as the proper debtor, or by any other parties, drawer or indorsers. But a drawer or indorser, before paying, must ascertain that the holder's recourse against him has been preserved by due negotiation of the bill or note, otherwise he will have no claim of indemnity for the sum paid against the previous parties. Negotiation shall be afterwards considered. There is also a question, viz. when payment made by a bankrupt is good to the person receiving it, or is challengeable by his other creditors? which shall be discussed in the Chapter on Bankruptcy.

2. To whom?

Payment, to be effectual, should be made to the proprietor of the bill or note, or a person authorised by him to receive it. Payment, therefore, to the original creditor will be unavailing after he has indorsed away the bill or note, whether the debtor has had notice of the indorsement or not¹. It has been said², that, if a bill is made payable to a certain party *only*, and is not negotiable, none but he, or a person holding power from him, can receive payment. In England, no bill or note is negotiable, unless made payable "to order." But such words are not necessary in Scotland; and, therefore, express words would be required there to restrain the negotiability of a bill or note. When a bill or note is made payable to A, "for the use of B," A. alone has a right to exact payment³. If a party dies, payment cannot be safely made to his personal representative, unless he is likewise confirmed as executor. When the debtor does not deny the representative's right to receive payment, the usual course, in an action against him, is to give decree conditionally, "the

¹ Pothier, No. 164.² Marius, 141.³ Evans v. Cramlington, and Smith v. Kendal, *antea*, 261, note 3.

“pursuer confirming before it is extracted,” so that it cannot be enforced till he confirms. It has been decided in England¹, that payment may be safely made to a person acting as administrator under the probate of a will, though the will itself turns out to be forged. The same rule would probably be held in Scotland regarding a payment to an executor confirmed under a forged will, as the confirmation is a sufficient warrant for payment.

The effect of payments to a minor², or any party not entitled to act for himself, as well as the right of a husband to exact payment of all bills and notes payable to his wife³, have been already explained. This right is, in general, subject to the same exceptions in favour of the wife, (as *præposita negotiis* or otherwise,) which have been already stated as to her power of granting obligations during the marriage⁴. It has been said⁵, that payments to a wife are, in general ineffectual, when the debtor knows that she is married, and *vice versa*⁶. But it would appear that his knowledge will be presumed, and that even ignorance will not excuse him, unless he shew a reasonable ground for it, as that the marriage has been always kept secret, since every person ought to know the public *status* of any party with whom he deals. Although payment to a minor is unavailable to the acceptor against the minor, except in so far as the money paid has been profitably applied to his use, it has been stated⁷, that such payment will be effectual against the drawer, as he must take the risk of having made his money payable to a minor. On the other hand, if the minor has received the money for the drawer's behoof, and has given him a counter-bill for it, it has been laid down⁸, on the principles already stated, that he may be restored against this bill, except in so far as the proceeds of the other bill are proved to have been employed for his benefit.

Payment may be made to a factor or mandatary of the party *in titulo* of the bill or note⁹, or to an individual part-

¹ Allen v. Dundas, 3 T. R. 125.

² Antea, 205, et seq.

³ Antea, 207, et seq.

⁴ Erskine, iii. 5. 7.

⁵ Antea, 214.

⁶ Chitty, 428.

⁷ Pothier, No. 166.

⁸ Ibid.

⁹ The efficacy of such payment to a factor is implied in Favene v. Bennett, 11 East. 540, the circumstances of which do not require to be detailed.

ner of a company which has right to it¹; the same rules, however, being observed regarding such payments which have been already laid down regarding the powers of agents or individual partners². In a case³, where the plaintiff belonged to two firms, consisting each of two partners, one in London and the other in Dublin, (the other partner being different in each firm,) and the Dublin house transmitted to the London house a bill drawn by the defendants, who afterwards deposited money with the Dublin house to pay it, but which money the other partner of that house misapplied without the plaintiff's knowledge, the latter was, notwithstanding, held to be bound by his partner's act, and was therefore prevented from suing the defendants, in right of the London house, with the other partner of that house, for payment of the bill.

The validity of payments to one of two or more individuals not in partnership, when a bill or note has been taken payable to them all, has been already discussed⁴.

In the case of⁵ a check payable to C. and S., assignees of P. or bearer, with their banker's name written across, which was paid in to these parties, as bankers for W. and C., they were found entitled to apply it to this account, the name of the bankers not being held, by the custom of merchants, to restrict the right in the check to the payees named.

It has been said that, when the payee of a bill acts merely as factor for another party, though his character of factor, as is implied, does not appear *ex facie* of the bill, the principal may countermand payment⁶. But Beawes⁷ reprobates this doctrine, as overturning the validity of all acceptances; and, unless the payee's character of agent appears *ex facie* of the bill, there seems to be no reason why the acceptor's obligation, which is to pay to him absolutely, should be revocable by a third party. It has been held in England, that a check on a banker is revoked by the granter's death, so that payment of it by the banker will not be good, unless

¹ Duff v. The East India Company, 15 Ves. 213, per Master of the Rolls.

² *Antea*, 220, et seq.

³ Jacaud and Gordon v. French and others, 12 East. 317.

⁴ *Antea*, 232-3.

⁵ Stewart v. Lee and others, 1 M. and Malk. 158.

⁶ Marius, 72-3.

⁷ No. 215.

it is made before he hears of the drawer's death¹. It seems to be considered as a kind of mandate. In Scotland, such a check, being an assignment of the funds in the banker's hands, might be completed by presentment to him even after the drawer's death. It has been found², that payment to a country attorney, who had been employed by the creditor's town attorney merely to arrest, in case of refusal to make payment, was not effectual, and that the debtor must pay again. The production of a bill or note will, in general, be a sufficient warrant for paying it to the holder as agent of the creditor³, though there should be no evidence that he is the creditor's ordinary agent⁴. The possession of the document is *prima facie* evidence of his authority, though that may be disproved by establishing that he came by it otherwise⁵.

The rules as to payment of a bill or note which has been lost or stolen to the actual holder, in the two cases of its being indorsed blank or in full, have been already stated⁶. The general result appears to be, that, when there is a full indorsement, the debtor cannot safely pay to the holder, unless he knows that he is indorsee, or holds a mandate from him to receive payment; but that, when the indorsement is blank, or the instrument is payable to the bearer, any holder is entitled to payment, unless there is reason to believe that he has come unfairly by the bill or note. As to the first of these propositions, it has been doubted whether the debtor would not be excused if he should pay the bill or note *bona fide* to a person who had taken it by robbery from the actual indorsee, and demanded payment by personating him. But the indorsement, by being special, designates a certain person as entitled alone to receive payment, and therefore notifies to the debtor that he will not be safe unless he ascertains that it is this person who gets payment⁷. This principle seems equally ap-

¹ Tait v. Hilbert, 2 Ves. 121, referred to in 16 Ves. 450.

² Yates v. Frecklington, 2 Dougl. 662.

³ This circumstance was left to the jury as evidence of agency, and held sufficient to prove it, to the effect of charging the principal with receiving a usurious payment, in Owen v. Barrow, 1 Bos. and Pull. N. R. 101.

⁴ Paley, Law of Principal and Agent, 276.

⁵ Per Holt, C. J., Anou. 12 Mod. 564.

⁶ Antea, 309, et seq.

⁷ Pothier, No. 168.

plicable, in whatever way the holder of the instrument has got possession of it, whether by his own unlawful act, or by accident, or by the negligence of the true creditor. It is also applicable where the holder endeavours to get payment by an indorsement forged in name of the true creditor in his favour; for this is, in fact, no indorsement, and, however dexterously it may be executed, the debtor is no more justified in paying on the faith of it, than he would be entitled to take credit against a person who had funds in his hands for paying a draft forged in his name¹. The same doctrine applies to payments made to a person claiming on a forged commission of factory, though the contrary is said to have been once decided². In all these cases, proper care would have detected the forgery; and the debtor must take the risk of paying without exerting such care³. Cases may be conceived, in which the negligence or fraud of the creditor may have afforded him ground to believe that he was safe in paying, and such negligence or fraud may give him a good claim against the creditor. But the title *ex facie* of the bill or note cannot justify payment. He will not even be justified for paying on a bill or note payable to the bearer, when the holder's right is liable to suspicion. For instance, it has been decided that, when bankers paid, without inquiry, a check which had been drawn by a customer, but was torn by him and thrown away as useless, and afterwards pieced together by some stranger who presented it, the rents being still visible, they could not take credit for it in their customer's account⁴. When the indorser of a bill lodges money with his bankers to pay it, and the banker's clerk, by mistake, pays with it another bill for the same sum, payable at the same place, and accepted by the same person, it has been held that the party depositing the money has no claim against the person who has got payment, but only against the bankers⁵. In another case⁶, where a party at whose house

¹ In *Borland v. Thistle Bank of Glasgow*, Feb. 1768, *Morr.* 877, it was found that a bank was not bound to pay value for notes forged in their name, and that, when a forged note is presented, they are entitled to stop its currency, by putting a doquet on it, certifying that it is a forgery.

² *Forbes*, 117 18.

³ *Vide Forbes*, 118.

⁴ *Scholey v. Ramsbottom*, 2 *Campb.* 485, *per* Lord Ellenborough.

⁵ *Rogers v. Kelly*, 2 *Campb.* 123, *per* Lord Ellenborough.

⁶ *Davies v. Watson and Broughton*, 2 *Nev. and Mann*, 709.

a bill had been drawn payable, but who had not undertaken it, paid it by mistake to an indorsee, instead of another bill of different amount which he had accepted, it was decided, that he could not, on the acceptor's bankruptcy, recover its amount from the drawer. It does not even seem to have been held that he could get it back from the indorsee. But it has been held, that, when bankers discount a bill on a forged indorsement, and its amount has been repaid to them through mistake, by a friend of the person whose name is forged, they are liable in repetition ¹.

The efficacy of payments to bankrupts, or those in the management of their estates, shall be afterwards discussed, in the Chapter on Bankruptcy.

¹ *Archer v. Bank of England*, 2 Dougl. 637.

SECTION II.

Time of Payment.

It follows from what has been already stated, that a bill or note transferable by delivery cannot be safely paid to the bearer before it becomes due ¹. It has been held that a banker who paid a check which had been lost, the day before it fell due, to a party who presented it, (though he had no notice of the loss,) was bound to pay it again to the loser ².

The same observation applies to such premature payment, when made to a person holding a mandate from the creditor, because the mandate may be recalled before the term of payment. There does not, however, appear to be risk in paying, even before the term of payment, to a person specially named as payee or indorsee, whether he holds the bill or note on his own account, or as mandatary for another, if his right *ex facie* of it is unqualified ³. The contrary doctrine, which has been laid down by some authors ⁴, proceeds on the exploded notion that the payee's right is only a mandate, which the drawer may recall before the term of payment. But, if the debtor, from the prospect of some benefit by the rate of exchange or otherwise, should offer payment before the term arrives, the creditor is not bound to take it, since the term of payment is a condition of the bill or note, fixed equally for behoof of both parties ⁵. If the creditor has funds of the debtor in his hands, he cannot retain them in security of a bill or note till it falls due, unless the debtor becomes insolvent ⁶. But his right of retention is complete at the term of payment; and if he has money of the debtor in his hands, he may immediately apply it in payment. In an English case ⁷, it was decided that a

¹ *Antea*, 310.

² *Da Silva v. Fuller, antea*, 340.

³ *Forbes*, 109; *Dupuys de la Serra*, 12, 7.

⁴ *Molloy*, B. 2, c. 10, § 32, and *Malynes*, C. 6. Obs. 10.

⁵ *Forbes*, 108.

⁶ *Vide* 2 *Bell*, 96.

⁷ *Rogerson v. Lashbrooke*, 7 *Moore*, 412.

banker might apply a customer's money in his hands to the extinction of a bill accepted by the customer, which the banker had acquired by discounting it, though the customer died on the day that it fell due, the bill having been written off in the banker's books as paid, an hour before he heard of the customer's death. In Scotland, the law would have warranted him to pay the one debt by the other, without any operation in his books. But, in the same case, it was decided, that the banker could not set off any part of the sum due to his customer against a note granted by him which the banker had discounted, and of which the term of payment was not arrived, seeing he had given credit for it till then. This was held to exclude the application of the English statute of set-off, and it would have excluded compensation in Scotland.

By the law of Scotland, as well as of England, bills or notes are not payable till the third day after the term of payment. These three days are called days of grace. It is said by one author¹, that the debtor may insist on the creditor taking payment when the bill or note falls due, though the days of grace have not expired, they being merely an indulgence to him. This rule has not been followed by us. At all events, the bill or note must be paid on the last day of grace; and, if it should fall on a Sunday, or a day when, by public authority², no business can be done, payment must be made on the preceding day³. Days of grace are allowed on all bills or notes payable at a definite term, whether after date or after sight. No days of grace are allowed on bills or notes payable on demand. The same rule has been laid down by some authors with regard to bills or notes payable at sight⁴. But it was taken for granted in an early English case⁵, that days of grace were to be allowed on such bills. The same thing was also assumed in another case⁶, where it was doubted whether they were allowed on a bill payable a certain time

¹ Dupuys de la Serra, c. 12, § 9.

² Forbes, 104.

³ This was decided in *Smith and Payne v. Laing, Arthur and Co.*, 29th June 1786, *Morr.* 1612.

⁴ Forbes, 107; Pothier, 172; *Jousse de l'Ordonnance*, 1673, 68; *Beawes*, No. 256; *Kyd*, 10.

⁵ *Dehors v. Harriot*, 1 *Show.* 163.

⁶ *Coleman v. Sayer*, 1 *Barnardist.* 303.

after sight. Again, in a case¹, where the question was, whether a bill payable at sight was included under an exception in the stamp act, 23 Geo. III. c. 49, § 4, in favour of bills payable *on demand*, the Court decided that it was not; and Buller, J., mentioned a case tried before Willes, C. J., in London, in which a jury of merchants were of opinion that days of grace are allowed on bills payable at sight. In Amsterdam, days of grace are allowed on such bills². There has been no decision on this subject in Scotland.

By the law of Scotland, payment, whether of a foreign or an inland bill, (for they are both on the same footing in this respect,) must be made at any hour of the last day of grace when it is demanded³. In England, this rule has been long established with regard to foreign bills, it being laid down that the holder is entitled and bound to protest on the last day of grace, if payment is not made on that day when demanded⁴, or at least is not offered in such time, that the holder may, in case of non-payment, take a protest that day. In inland bills, it was once held that the debtor had all the last day of grace to pay them⁵. But this rule was afterwards

¹ *J'Anson v. Thomas*, Bayley, 98, note 22. This author also expresses his own opinion, 244-5, that days of grace are allowed on bills payable after sight. *Vide* likewise Selwyn's N. P. 353, 5th edition.

² *Forbes*, 107.

³ In *Cruickshanks v. Mitchell*, 17-29th June 1748, *Morr.* 1576, being the case of a bill drawn in Scotland on London, the Court, after evidence as to the practice regarding foreign bills, decided that the protest was null, when taken the day after expiration of the days of grace. The argument of the successful party was, that the days of grace were not a delay of payment, but an indulgence, not inconsistent with a protest. It was, of course, implied that the debtor was bound to make payment at any time on the last day of grace, since a protest could not then be competent for non-payment, unless payment was due. The same principle was followed in *Tod v. Maxwell*, 12th July 1756, *Morr.* 1583, where a bill on London was found not to be properly negotiated by protesting it the day after expiration of the days of grace. Although both these are instances of foreign bills, no distinction in principle appears to have been ever recognised in Scotland on this point betwixt them and inland bills.

⁴ The law is laid down almost in those terms, in *Tassel v. Lee*, 1 Lord Raym. 743.

⁵ *Per* Buller, J., in *Colkett v. Freeman*, 2 T. R. 61. The same opinion was laid down by Lord Kenyon, C. J., in *Lefley v. Mills*, 4 T. R. 174. But it was then disputed by Buller, J., who laid it down as a settled rule, that "the nature of the acceptor's undertaking is to pay the bill on demand at any time of the third day of grace." The case was decided, not on this general ground,

disputed¹; and it seems to have been at last settled, as held in Scotland, that, if the debtor refuses payment at any time on the last day of grace, the bill may be immediately protested².

The mode of computing the term of payment, whether with reference to the time mentioned in the bill or note, or the number of additional days allowed as days of grace, varies in different countries. When a bill or note, drawn in one country and payable in another, is payable a certain time *after date*, the computation of the term of payment is understood to depend on the style or mode of calculating time that prevails in the place where it is drawn³. For the term of payment, in that case, bears reference to *the date*, which must depend on the style of the country where the bill was dated. In all other cases, the term of payment must be computed according to the style of the country where the bill is payable, as, in all particulars of the contract, parties are understood, (unless the contrary is expressed,) to have in view the law of the country where it is to be performed⁴. In bills payable after date, the date must be reduced or carried forward from the style of the place where the bill was drawn, to that of the place where it is payable; and the term of payment calculated from the date thus carried forward⁵.

The days of grace are regulated by the custom of the country where the bill or note is payable. In England and Scotland, as in most countries of Europe, they are exclusive of the day on which it falls due⁶. But in Hamburgh, where the days of grace are eleven, it is said to have been decided⁷, that the holder need not present for payment till

but on the special terms of the English act 9 and 10 W. III. regarding protests on inland bills.

¹ *Per* Lord Alvanley in *Haynes v. Birks*, 3 Bos. and Pull. 599, who observed that the rule, though laid down by Lord Kenyon in *Leftley v. Mills*, note 2, was not assented to by Buller, J.

² This doctrine was laid down by Lord Ellenborough in *Burbridge v. Mannors*, 3 Campb. 194, and afterwards assented to by the Lord Chancellor in *Moline ex parte*, 19 Ves. 216. The same rule seems to be implied in *Hume v. Peploe*, 8 East. 168-9.

³ *Marius*, 89-90; *Bayley*, 249.

⁴ *Marius*, 100-1.

⁵ *Ibid.* 89; *Bayley*, 249.

⁶ *Forbes*, 104.

⁷ *Goldsmith v. Shee*; *vide Bayley*, 246.

the eleventh day, if it is a post-day ; although, if it is not, he must present the immediately preceding post-day. If the drawee resides, not at Hamburgh, but at Bremen, or some place in daily intercourse with it, it is enough to present the bill or note on the eleventh day, though not a post-day ¹.

A bill or note drawn between two countries is sometimes also made payable at usance ; which is the period usually allowed for the payment of bills or notes between two countries. Usance varies from fourteen days, to one, two or three months after the date of the bill. Double or treble usance is twice or three times the usual time, and half usance is half that time. The days of grace are added after expiration of usance specified in the bill.

A table is subjoined in the Appendix of the number of days of grace allowed in different countries of Europe, as well as the length of the usances established betwixt different countries.

When a bill or note is payable a certain time (whether expressed in days, months, or usances,) after date or after sight, this period is computed exclusive of its date or day of presentment ². When the term that it has to run is expressed in months, calendar months and not lunar months are understood ³. Though one of these months should be longer than the succeeding month, the term of payment, if a month, is never carried into the third month. For instance, whether a bill or note be dated on 28th, 29th, 30th, or 31st January, if it is made payable a month after date, it will become due on 28th February, or, in leap year, on the 29th ⁴. It has been

¹ Goldsmith v. Bland, Bayley, 246.

² This was decided, as to a bill payable after date, in *Hague v. French*, 3 Bos. and Pull. 173 ; as to bills payable after sight, it was held by Treby, C. J., in *Bellasis v. Hester*, 1 Lord Raym. 280, and was taken for granted in *Campbell v. French*, 6 T. R. 212.

³ Beawes, No. 253.

⁴ Kyd, 6, Beawes, No. 253-5 ; Marius, 74 ; Forbes, 104-5. In *Jarron v. Smith & Co.*, 17th June 1803, Morr. App. to Bill, 18, where a bill was dated on 30th April, and payable three months after date, it is said to have been held " that, by the practice of merchants, the 2d August was the last day of grace," not the 3d, which it would have been according to the rule stated in the text. But this was not decided, and the foregoing authorities seem to prove, that the contrary is the practice of merchants.

laid down by Marius¹, that when a bill or note is payable in a month and a half, or half a month, the half month must be held to consist only of fifteen days. But a modern French author² holds, that it should be sixteen days, thus giving the debtor the benefit of the 31st day.

When no term of payment is mentioned in a bill or note, it would probably be held payable at sight³, and days of grace would be allowed on it. It is stated that no days of grace are claimed on bank-post bills payable after sight; the currency of which, it is said, commences on the day after their presentment⁴. It is the custom, on all bills payable to the excise, to allow six days in addition to the days of grace, on payment of a shilling to the clerk for his trouble, at the end of the six days; and this custom, being general, has been recognised in one case, where the commissioners of excise, being payees of a bill, having given the additional six days, Lord Mansfield held that they were not thereby cut off from their recourse against the drawer⁵. It is said that this practice does not now prevail⁶.

If the creditor in a bill or note will not take payment when it is due, the debtor should tender it to him by form of instrument⁷. It is said to have been decided, that such a tender, even without consignation, will free him from interest⁸. But consignation in some responsible bank seems to be the only mode of freeing him from future claim. It would appear sufficient if made by instrument; but he will be freed from all challenge, if it is made by warrant of a judge⁹. Consignation will not be sufficient, without a previous tender¹⁰. Nor will consignation in Scotland be sufficient on a debt payable in London, unless the amount of exchange is also consigned¹¹. The creditor is not bound to accept an offer of

¹ 93.

² Pardessus, No. 251.

³ Walker v. Atwood, 11 Mod. 190; Scarlett, C. 14, R. 5; Forbes, 104.

⁴ Lovell, 247.

⁵ Wilford v. Hankin, cited by Chitty, 409.

⁶ Chitty, 409.

⁷ Forbes, 112.

⁸ Boick v. Blackwood, 12th July 1703, cited by Forbes, 102-3.

⁹ This is the mode suggested by Forbes, 112.

¹⁰ Earl of Queensberry v. Duke of Buccleugh, 9th July 1675, cited by Forbes, 112.

¹¹ In Temple v. Wallace, 18th Feb. 1701, also cited by Forbes, 112, a person who had suspended a charge on a debt of this kind upon consignation, was or-

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payment from the debtor or any third party, after the bill and protest have been sent away, or, even though they should not, after he has re-drawn for the value¹. Indeed, it would appear, that he is not bound to accept such an offer, even when made on the last day of grace, after payment has been refused and the bill protested, unless the expense of the protest is also offered². A tender of payment by the drawer or indorsers of a bill or note is sufficient, when made as soon as they have got notice of non-payment³. But, as each of them has guaranteed payment by the proper debtor, the expenses incurred through his non-payment must likewise be tendered.

ained to uplift the consigned money, and pay it at London, where the debt was payable, as he had not consigned the amount of the exchange.

¹ Forbes, 113.

² In the English case of *Leftley v. Mills*, 4 T. R. 170, where payment of a bill was offered on the last day of grace, after it had been refused on the same day, and a protest taken, the creditor was found not entitled to the expense of the protest. But this decision proceeded on the terms of the English act 9 and 10 Wil. III. c. 17, which were held not to authorise a protest on inland bills till after the last day of grace.

³ This was decided in *Walker v. Barnes*, 5 Taunt. 240, by the Court of Common Pleas, in a question with the drawer; it being held that he was not bound to pay till within a reasonable time after he had got notice, (in this case he tendered payment the day after,) as he could not know till then who was the holder of the bill. But the true doctrine appears to be, that the drawer and indorsers ought to be always ready to make payment at any time after the bill or note has fallen due, and will therefore be liable immediately upon receiving notice; *Bayley*, 350, and *Siggars v. Lewis*, 2 Dowl. P. C. 1. Cr.-M. and R. 370, 4 Tyrwh. 847, S. C. *post*, under the head of Notice.

SECTION III.

Place of Payment.

It is a question, if a bill or note does not specify a place of payment, whether the acceptor or granter is bound to seek out the creditor, and make payment, or whether the latter ought to apply for it? This question cannot occur unless with the acceptor or granter, who are the proper debtors; for the other parties cannot be bound to pay, or even to know that the proper debtors have failed, till it is notified to them. But the proper debtors must pay absolutely, and at all events. As to them, Forbes¹, though he notices the question now stated as being discussed unsatisfactorily by a foreign jurist², does not decide it, but lays down a distinction between the place where payment ought to be made, and that where it may be sued for, and then proceeds to say, that, where no place of payment is specified, the creditor ought to require it "at the debtor's dwelling-house, or shop, or office, and there protest for want of it." This passage seems to refer only to what the creditor should do to preserve his recourse against the drawer and indorsers, of which afterwards. But, as to the question, where a debtor ought to pay when no place is specified, it seems to be held in England, that he is bound to seek out his creditor; and that the latter, when the debt becomes due, may raise an action without giving him notice³. Accordingly, in the case of bills and notes, it has been held not necessary for the creditor to aver a demand on the debtor, even when a note is payable on demand, as the obligation implies an absolute debt preceding, which even the words "on demand" do not qualify⁴. This rule, however, seems

¹ 111-12.² Scaccia, § 2, Gloss. 5, N. 220-31.³ Chitty, 391, and authorities there referred to.⁴ This was held in *Rumball v. Ball*, 10 Mod. 38, which was the case of a note payable on demand; and in *Frampton v. Coulson*, 1 Wils. 33, which was the case of a note payable four months after date. The same rule was also held in *Wegersloff v. Keene*, 1 Str. 222.

to be considered by a recent author as too strict, and he has suggested that the holder should perhaps be required to present the bill or note to the debtor before being entitled to sue him for it ¹. With regard to debts generally, when a debtor engages to pay without specifying a place of payment, he contracts an absolute obligation to pay the creditor at the term of payment, and is bound to do so wherever the creditor may be, while the creditor fulfils his part of the contract by receiving and discharging the debt. This rule seems applicable to bills or notes so far as regards the payee, who must be known to the grantor or acceptor. Nor is it incompatible with the rule, that the creditor must present the bill or note, and afterwards take a protest, to authorise summary diligence, even against the acceptor or grantor; because this is merely a requisite of summary diligence, and does not apply when it is not used. There is, indeed, an exception in bills or notes payable on demand, and at or after sight; because, although there is, in both cases, a debt due, the debtor does not seem bound to pay, in the latter case, till the bill or note has been presented to him, at least for acceptance, or in the former case, till the creditor makes a demand. It does not seem correct to hold, as in England, that an action is a sufficient demand, since neither action nor diligence appears to be competent till the debtor has had an opportunity to pay and has refused. In all other cases, the rule now stated appears to be correct with reference to the original creditor ². But, although the debtor has rendered himself also liable to any indorsee or holder actual or future, neither party could contemplate an obligation by him to make payment to them, without notice who is the holder. In the case, therefore, of a holder different from the payee, presentment or notice seems necessary to warrant an action even against the acceptor.

What has been now stated refers to those cases where no place of payment is specified. The effect of such specification, whether in the body of a bill or note, or subjoined to the ac-

¹ Chitty, 392.

² The case of *Soward v. Palmer*, 8 Taunt. 277, appears to have been decided on an opposite principle. But that case was somewhat special, and does not appear sufficient to overrule the general doctrine now stated.

ceptance, or in a separate memorandum, shall be considered with reference to the presentment of bills and notes. In the meantime, it may be stated, that, when a place of payment is mentioned in the *body* of a bill or note, payment ought to be made at that place, and that the law of that place must regulate the mode of payment, being in view when the parties stipulated that the contract should be there performed. Bills or notes signed by a company must be presented at their place of business, since it is there that they do business as a company ¹.

¹ *Vide* 1 Bell, 324, 4th edition.

SECTION IV.

Mode of Payment.

1. In coin.

It has been explained, that bills or notes must be paid absolutely, and that they cannot contain an obligation, either to make payment, or to do some other act. Forbes¹ has mentioned an obligation, either to procure a discharge of certain bills, or to pay the value. But this appears to have been a separate agreement, not an obligation in a bill or note. It has been likewise shewn, that the payment of bills or notes must be stipulated and made in money, not in other commodities. They must also be paid in the coin stipulated, or, if no coin is mentioned, in that which is the legal money in the place of payment. It is a question, viz. whether the debtor or creditor is to bear the depreciation, or reap the benefit of any rise during the currency of the obligation, in the coin in which payment is stipulated? Forbes² decides, that, in that event, the creditor must bear the loss or take the benefit, unless he has specified the value of the coin, in which case he says, the number of pieces will be greater or smaller as their value has been diminished or enhanced. Even this stipulation, he seems to hold, would only be applicable to alterations of value made by custom, and not to those made by public authority, which must decide, in all cases, the denomination of the coin, so that the creditor must suffer the risk of any change made by authority before the term of payment, though he is not bound to take payment in coin just about to be cried down³. According to this doctrine, the creditor must take payment in the stipulated coin, according to its value at the time of payment, without regard to any change made in it after the date of the bill or note, by the law of the country where payment is to be made, the parties being understood to have in view the state of things where the contract is to be performed, at the time of performance. Yet it was found, in

¹ 103-4.² 101-2.³ 103.

an English case¹, that a bill drawn in London on a merchant in Portugal, payable in milrees, must be paid according to the value of that coin when the bill was drawn, (as there had been a depreciation before it was presented); because, though an alteration in English coin, by public authority, might affect the contracts of English subjects, no such alteration made by a foreign government could have this effect. It might have been answered, that the parties, in making the contract, had a view to the law of the country where it was to be performed. But although a note payable at Paris, or, at the bearer's option, in London, according to the course of exchange on Paris, should be drawn when there is a direct course betwixt London and Paris, and this should be interrupted before the term of payment, the granters will be liable according to the circuitous course of exchange which exists *at that date*². This decision seems to recognise the doctrine, that parties must be held to contemplate the state of things at the term of payment.

2. By bills or checks.

The effect of payment by a remittance of bills by post, although they should be lost, has been already discussed³. In the case of an agent receiving payment for his principal, and remitting the money by bills from third parties, it has been decided⁴, that a steward in the country who sends rents to his master in London, by taking bills from persons who are reputed of credit and substance, will not be responsible though the bills are dishonoured and the money lost; and the same doctrine is held, if a trustee or agent lodges money belonging to his constituent with a banker then in good credit, who fails⁵. But it has been also decided, that, if he deposits his constituent's money with his banker as his own, and not in his constituent's name, so that he might have drawn it out on his own account, he must suffer the loss, if the banker fails⁶.

¹ *Da Costa v. Cole*, Skin. 272, *per* Holt, C. J.

² *Pollard v. Herries*, 3 Bos. and Pull. 335.

³ *Antea*, 318.

⁴ *Knight v. Lord Plymouth*, 3 Atk. 480. *Vide* on the same subject, Pothier, No. 85.

⁵ *Rowth v. Howell*, 3 Ves. 566, *per* the Lord Chancellor; *Adams v. Claxton*, 6 Vesey, 226 and 231, *per* Master of the Rolls.

⁶ *Wren v. Kirton*, 11 Ves. 381, *per* the Lord Chancellor.

We have already considered the effect of payment by a draft on the debtor's banker, whether the creditor agrees or not to take the risk of it, and also the consequence of his not using due diligence for payment of it ¹.

Marius advises the holder of a bill, when a draft on a banker is given him in payment, not to give the bill up till the draft is paid ². In one case, however, where the plaintiffs, holders of a bill, had sent to their correspondents in London to recover payment, and the latter gave it up to the acceptors on getting a check from them for the amount, which was dishonoured, the plaintiffs were non-suited, in an action against their correspondents for negligence, as they had acted only according to the usual course of trade ³. But, where a bill had been given up to the acceptors, on the latter giving the holder a check in payment, which was dishonoured, it was decided that the holder could not recover against the drawer and indorser without producing the bill ⁴. It was not disputed that the drawer would have been liable, if the holder had recovered and produced the bill, and the acceptor was bound to give it up. But it was found, that the holder must take the risk of its having been given to the acceptor, although, according to the previous case, his agents, if employed to recover payment, would have been entitled to run such a risk, in the usual course of business ⁵. The acceptor granting a check in payment will be discharged, if the holder takes payment from the banker on whom it is drawn in his own notes, though the banker should fail; as the holder thus gives a new credit to the bankers, with which the drawer of the check has no concern ⁶. The mere production of a check drawn by

¹ *Antea*, 172, *et seq.*

² 21-5.

³ *Russell v. Hankey*, 6 T. R. 12. *Vide* also to the same effect *Ridley v. Blackett*, Peake's Add. Cases, 62.

⁴ *Per* Lord Ellenborough, in *Powell v. Roach*, 6 Esp. 76.

⁵ In this case, the holder had given notice of non-payment to the indorsers as soon as the check was dishonoured. Whether this was due notice shall be afterwards considered. But the defendants had besides waived the question of notice, by promising to pay the bill if it was produced.

⁶ *Vernon v. Bouverie*, 2 Show. 295-6. In this case the holder of the check, (or of notes on his debtor's banker,) might have had cash, but rather chose notes from the banker, payable to a party to whom he owed money. He had given his debtor a receipt on getting the check, but this circumstance does not appear to have been relied on.

the debtor in the creditor's favour, and indorsed by the latter, has been held to be *prima facie* evidence of the contents being applied to the debt in question ¹, if it is not alleged that there were other transactions between them ², although, without the creditor's indorsement, the check, even when drawn in his name, will not be evidence that he got the money ³. It has been suggested ⁴, that even the indorsement of the check will not be evidence, unless it is stamped as a receipt, such an indorsement not falling within the exemption of the stamp act ⁵ in favour of receipts "written upon promissory-notes, bills of exchange, drafts or orders for the payment of money, *duly stamped according to the laws in force,*" &c. or on foreign bills payable in Great Britain. But it may perhaps be held, that a receipt on the check should not require a stamp, when the check itself requires none ⁶.

The holder of a note having given it up to the granter, on receiving an assignment of sale to his effects as payment, (which assignment, however, was set aside on the ground of the granter's bankruptcy,) and the note having been destroyed, he had a decree, notwithstanding, against other parties whose names were on it, for principal, interest and costs, after deducting what he might receive from the granter's estate ⁷.

The holder of a bill, by accepting a composition from the indorser, is excluded from afterwards suing for the full amount of such bills as were then in the hands of an onerous indorsee, and had become due ⁸. The creditors of a bank-

¹ *Egg v. Barnet*, 3 Esp. 196, *per* Lord Kenyon.

² In *Aubert v. Walsh*, 4 Taunt. 493, where a number of checks drawn by the defendants, and paid to the plaintiffs, was produced by the former as evidence of set-off against the latter's claim, (there having been various transactions between the parties,) the Court of C. P. refused to admit such evidence, as it was not proved for what consideration the checks had been given. This decision is not inconsistent with that in *Egg v. Barnet*, note 1, where it was not alleged that there could be any other consideration than the debt in question. It has been held in *Cary v. Gearish*, 4 Esp. 9, and *Lloyd v. Sandilands, Gow*, 16, that a check, without any other evidence, does not *per se* prove a loan by the drawer to the person in whose favour it is drawn.

³ *Egg v. Barnet*, note 1.

⁴ *Chitty*, 435.

⁵ 55 Geo. III. c. 184, Schedule, Part 1, *vide* Receipt.

⁶ *Chitty*, *Addenda*, 800.

⁷ *Gregory v. Russell and others*, 6 Madd. 186.

⁸ *Margetson v. Aitken*, 3 C. and Pay. 338.

rupt, by taking bills from him for a composition on their claim, and giving him a full discharge of the debt, are precluded, even on his failure to pay the bills, from claiming afterwards, under a sequestration against him, for more than the amount of the composition ¹.

3. Implied payment.

It has been held in England, that a legacy by the drawer of a bill to the payee for a larger sum than the amount of the bill does not extinguish it, though the bill should happen to be in the payee's hands, at the testator's death, as the testator had reason to believe, from the negotiable nature of bills, that it might have passed, before his death, to a third party ². But a paper in the creditor's hand, dated after his will, and bearing that his debtor in a note was to pay no interest, "nor shall I ever take the principal, unless greatly distressed," (it being proved that the creditor died in affluence,) was found, in a question with his executors, to discharge the debt ³.

4. Indefinite payment.

When the proper debtor in a bill or note owes several debts to the holder, and makes an indefinite payment, it is a question, how far this payment must be applied to the bill or note, or to the other debts due to the holder. The general rule of the civil law, in the case of indefinite payments, was, that if the debtor did not appropriate them, the creditor was entitled to do so, at the time of payment, but not *ex post facto* ⁴, so as to meet the state of claims between them and the debtor as at an after period. Failing such appropriation, the indefinite payment was first imputed to the debt most severe on the debtor, or, otherwise, to that which had been longest due. It was likewise imputed first to interest, before principal sums ⁵. In England, when the person making an indefinite payment owes several debts to the payee, the latter may select the debt to which it shall be applied, without being confined to the date of the payment, or, where one debt is secured by sureties and another not, being obliged to consult the interest of the sureties, by appropriating any part of the pay-

¹ *Graham v. Cuthbertson*, 9th Dec. 1828, 7 S. and D. 152.

² *Carr v. Eastbrook*, 3 Ves. 561.

³ *Aston v. Pyc*, cited in *Eden v. Smith*, 5 Vesey, 350, note.

⁴ Dig. 46, 3, 1.

⁵ Ibid. 46, 3, 5.

ment to their debt ¹. There seems to be only one exception to this doctrine, viz. that, where one debt might create rigorous penal consequences against the debtor, as where he might be rendered bankrupt on it, and another debt could have no such effect, an indefinite payment must be imputed to the former debt ².

In Scotland, the same rule exists in favour of the debtor, as to debts inferring a high penal certification against him; for instance, when an adjudication has been led against him on one debt, and not on another. But, when no such penalty attaches to any one debt, an indefinite payment will, with a view to the creditor's interest, be applied to the debt least secured; for instance, to one resting on a personal obligation, in preference to one heritably secured, or to one which will otherwise be prescribed, or to a debt which does not carry interest, in preference to one which does, or generally to such debt as the creditor chooses ³. We follow the civil law, however, in applying such payments to interest, before principal sums ⁴. Farther, when there are sureties with the debtor for one debt, and none for another, it has been decided that the creditor is bound to apply an indefinite payment to the two debts, in proportion to their respective amounts, so as to give a proportional relief to the sureties ⁵. A contrary doctrine, indeed, seems to have been followed in one or two recent cases ⁶. But it may be doubted whether these cases, in which

¹ *Goddard v. Cox*, 2 Str. 1194; *Bosanquet v. Wray*, 6 Taunt. 597; *Kirby v. The Duke of Marlborough*, 2 M. and S. 18; *Plomer v. Long*, 1 Stark. 153. *Vide Biggs v. Dwight*, 1 M. and Ryl. 308. The judgment of the Court, however, in that case, appears to have proceeded ultimately on the ground of specific appropriation of the payment; also *Crookshank v. Rose*, 5 C. and Pay. 19, and *Philpott v. Jones*, 2 Ad. and Ell. 41, 4 Nev. and Mann, 614, where the Court allowed an indefinite payment to be imputed to furnishings of agents under twenty shillings at one time, and sustained action for the rest of the claim, which was unobjectionable.

² *Megget v. Mills*, 1 Raym. 285, *per Holt*, C. J., and *Bowe v. Holdsworth*, Peake, N. P. C. 64; in both of which cases, the effect of imputing the payment to the debt selected by the creditor would have been to render the debtor bankrupt on another debt.

³ *M'Leod v. M'Kenzie*, 26th Jan. 1821, 1 Shaw, 86; *Dickie v. Carnie and Co.*, 21st Nov. 1834, 13 S. D. B. 71.

⁴ *Ersk.* iii. 4. 2.

⁵ *Ibid.* *Duchess of Buccleugh v. Doul*, Feb. 1725, *Morr.* 6807.

⁶ *Cochrane and Co. v. Mathie*, 22d June 1821, 1 Shaw, 80; *Bannstynes's Representatives v. Brown's Trustees*, 26th Feb. 1825, 3 S. and D. 593.

the point does not appear to have been discussed, are sufficient to alter the rule already noticed. As to bills or notes, a learned author observes, that the holder, when he has a balance in his hands belonging to the acceptor, without other claims to set off against it, is bound to deduct it from the bill before claiming on it against the drawer or indorsers; and he cites a case where this plea would have been sustained at the instance of the indorsers against the holders of a bill, if the fact of the latter having a balance belonging to the acceptors had been proved¹. But he states, that, when the holder has any other claim against the acceptor, he is entitled to set off the latter's money in his hands entirely against it. This doctrine does not, at first sight, seem compatible with that already mentioned, viz. that when a third party is bound along with the debtor as surety for one claim, and there is no surety for another, the creditor receiving an indefinite payment must impute it proportionally to both claims. But, as all the obligants on a bill or note, whether they have signed for the accommodation of other parties or not, are liable to the holder directly as principals, their mutual obligations as principals or sureties seem to be merely relations *inter se*, which cannot have effect against the holder, regarding the application of indefinite payments made to him, or for any other purpose. A decision to this effect has been given in an English case², where it has been held, that the creditor in a bill was entitled to set off the balance due by him to the acceptor against a separate debt which the latter owed to him, the Court proceeding on the doctrine, that the creditor was entitled to impute a payment by his debtor to what debt he chose. Nor can the acceptors of a bill plead against the holder any private arrangement between them and the other parties as a reason for staying summary diligence against them, till the amount of the drawer's or indorser's funds in the holder's hands has been ascertained. It was therefore decided, that

¹ 1 Bell, 423, note 1, *Calder and Co. v. The Leith Bank*, 30th May 1816. In this case, as reported by Mr Bell, the Court, by the narrowest majority, refused a suspension by the indorsers of a charge given them by the holders, solely because the fact of their being a balance in their hands belonging to the acceptors was not completely verified. Had it been verified, the result would have been opposite.

² *Crosse v. Smith*, 1 M. and S.

acceptors could not, on the averment that they were accommodation-acceptors, suspend diligence of the holders, till the latter assigned to them a mortgage which they had from the other parties, although the assignation was asked only under reservation of a preference over it to the holders for all their other claims, the Court being of opinion that, as the suspenders were primary debtors *ex facie* of the bill, no claim founded on a contrary assumption could be allowed to stay diligence, though it might be discussed in an ordinary action¹.

When a person has only one general account with a banker, it has been decided in England, and seems just, that his payments, advances, or receipts, shall be set off against the opposite articles in the earliest part of the account, since both parties must have understood that the articles on opposite sides were to be set off against each other according to their dates, so as to carry down a balance from beginning to end of the account, and not the contrary way². If the drawer of a bill informs the bankers with whom it has been discounted, on its falling due, that it is for his accommodation, and the bankers agree, at his request, to apply to him only, and he afterwards pays them more than the amount of the bill, it will be thereby extinguished, so that they cannot afterwards sue the acceptor, though the drawer should fail, while in their debt, in consequence of subsequent advances³. So, if the drawer and discounter of a bill directs the bankers, who hold it, to apply

¹ *Cowan and Sons v Hurry and others*, 19th Dec. 1816, F. C. I have seen cause, on full consideration, to alter very materially the doctrine which I ventured to state on this subject in a former edition.

² *Per* Master of the Rolls in Clayton's cases, 1 Merivale, 608. *Vide* *Simson v. Cooke*, 8 Moore, 606; and also *Field and others v. Carr*, 5 Bingh. 13, where the same rule was applied as to the extinction by subsequent payments of certain articles in an account with bankers, in security of which a bill granted by a third party had been indorsed to the bankers, the Court holding, that, as the subsequent payments were more than sufficient to extinguish the balance in security of which the bill had been given, (though there was ultimately a balance in favour of the bankers on the whole account,) the bankers could no longer sue the acceptor of the bill upon it. The acceptor had paid the bill to the payee, but had neglected to get it up from him.

³ *Per* Abbot, J., in *Marsh v. Houlditch*, Chitty, 437, note c. The same rule was followed in *Hammersley v. Knowllys*, 2 Esp. 665, cited also in 1 Meriv. 669, where a person having discounted a note with bankers, which he told them was for his accommodation, and having afterwards made payments exceeding its amount, the note was held to be thereby extinguished, though the bankers afterwards made advances to him to a much greater amount.

certain funds of his in payment of it, which they agree to do, they cannot afterwards apply these funds to other debts of his, and exact payment of the bill from the acceptor¹. In the first of these cases, which was an action by the holder of the bill on it against the acceptor, the drawer, having been previously released by the acceptor, was admitted to prove the holder's knowledge that he was principal debtor. This evidence would seem admissible even in Scotland to prove such knowledge by the holder, since its effect is, not to abridge the holder's rights as appearing *ex facie* of the bill, but to secure him in payment from the drawer as principal debtor. But it is not probable that evidence less than the holder's own writ or oath would be admitted to prove, on the drawer failing to pay, that he had renounced his claim against the acceptor, as primary debtor *ex facie* of the bill.

If a party deposits a bill with a company as a continuing security, the circumstance of his having afterwards a sum at his credit with the same company will not operate an extinction of the bill, but it may be afterwards enforced against the other parties for a balance subsequently becoming due².

5. Conditional payment.

If a party pays the amount of a debt, due by bill, into a banking-house, under a certain condition, and to remain there in his name till it is fulfilled, he must bear the risk of the banker failing before fulfilment of the condition, though the creditor had desired him to pay the money to the banker generally on his account³. For the money is thus merely deposited with the banker in the meantime, for the debtor's behoof.

6. Partial payment.

It is settled in Scotland, that the holder of a bill or note may take a partial payment from the acceptor, without cutting off his claim of recourse against the other parties⁴. But he

¹ Allan v. Allan and Co., 1st March 1831, 9 S. D. B. 519.

² Pense v. Hirst, 10 B. and Cr. 122, *antea*, 244. *Vide* a circumstantial case of this kind, Bloxome v. Neale, Chitty, *Addenda*, 796. *Quoad ultra*, as to the application of payments, *vide* Chapter on Bankruptcy.

³ Colley v. Short, 1 Coop. Eq. Cas. 148.

⁴ Hodgson and Donaldson v. Bushby, 18th July, 2d Dec. 1782, Morr. 1609. Although the judgment of the Court of Session was reversed in this case by the House of Lords on another ground, both tribunals agreed as to the doctrine stated in the text.

must protest the bill in so far as it is not paid ¹. A different doctrine was once held in England ²; but it is now settled that the holder may safely take a partial payment from the acceptor, or any other party, without losing his recourse against the other parties for the residue³. The circumstance of recovering judgment against one of the obligants in a promissory-note, and levying part of the note under it, has been held not to discharge the other obligant⁴. But, although the holder runs no risk in taking a partial payment, he is not bound to take less than the whole ⁵.

The effect of giving indulgence, or granting an absolute or partial release to one obligant in a bill or note, with reference to the holder's claim against the other obligants, shall be afterwards considered.

7. Compensation,—Novation.

Although the holder of a bill or note may set it off by compensation against any sum due by him to the debtor, the bill or note, unless given up to the debtor, will not be extinguished, since the holder may transfer it, even after the term of payment, to a third party, whose claim under it, according to various decisions already cited ⁶, will not be affected by grounds of compensation pleadable against his author. The same principle seems applicable to that kind of compensation which is called *confusio*, and which occurs when the creditor in a bill or note comes in right of the debtor, for instance, when he takes up the acceptor's succession. An indorsement by him, even

¹ Marius, 85-6.

² In *Tassel v. Lewis*, 1 Raym. 744, it was ruled, that "if the indorsee of a bill accepts but twopence from the acceptor, he can never after resort to the drawer." The same doctrine was held in *Kellock v. Robinson*, 2 Str. 745, with regard to a partial payment received from the granter of a promissory-note.

³ Marius, 86-7, says, that a partial payment may be safely received, and a receipt granted for it on the bill, if a protest is taken for non-payment of the balance. In *Gould v. Robson*, 8 East. 576, such a payment taken from the acceptor was held not to bar a claim for the balance against an indorser; and in *Walwyn v. St Quintin*, 1 B. and P. 652, the taking of a partial payment from an indorser was held not to discharge the drawer, for whose accommodation the bill had been accepted. The doctrine in the text was here laid down with regard to partial payments generally. *Vide Bayley*, 343.

⁴ *Per Sir J. Mansfield, C. J.*, in *Ayrey v. Davenport*, 2 B. and P. New Rep. 476.

⁵ Forbes, 103.

⁶ *Anleu*, 263, *et seq.*

when made after that event, would appear to be still effectual to the indorsee. It has been decided¹ in England, that, when the payee of a note makes the granter his executor, the note is discharged, and cannot afford ground of action even to an indorsee of the executor. But here the indorser was debtor *ex facie* of the note, and the decision cannot, therefore, apply, where the creditor succeeds to the debtor. When the currency of a bill or note has been stopped by the holder's bankruptcy, compensation extinguishes it. Its effect, in that case, shall be considered in the Chapter on Bankruptcy.

Novation, or accepting a new security in exchange for a bill or note, to its entire extinction, cannot be considered as payment, though it releases the obligants in the original bill or note, unless they are parties to the new security. It has been already stated² in what cases novation can be said to have taken place. Its effect, when conceded to the acceptor or granter, drawer or indorser of a bill or note, in releasing the subsequent parties, shall be afterwards explained³.

¹ *Freakly v. Fox*, 9 B. and Cr. 130.

² *Antea*, 165, *et seq.*

³ *Vide* Chapter on Negotiation, sect. 3.

SECTION V.

Evidence of Payment.

1. Receipt.

When a party pays a bill or note, he is entitled to a receipt for it ¹. A receipt distinct from the bill or note, whether for its whole amount, or only for part, will not, as already shewn, prevent an onerous holder from recovering second payment ². It should, therefore, be written on the bill or note. It has been also held, that bankers getting payment of bills or notes should make a memorandum of payment on the back of them ³. Such a receipt is exempted from the stamps applicable to receipts in general ⁴. A receipt on the back of a bill or note in the creditor's handwriting, (the debtor holding it,) cannot be redargued by parole evidence that it was written by mistake ⁵. Indorsements of interest on a bill or note are presumed to have been written on the date which they bear ⁶. It has been already explained to what extent a check, given for the amount of a bill by a party liable for it, affords a presumption of his having paid it ⁷. It has been also shewn, that a general receipt on a bill or note founds a presumption of payment by the acceptor or granter ⁸. When, therefore, any other party makes payment, this fact ought to be stated in the receipt. In England, an indorser claiming reimbursement from the acceptor for the amount of a bill, which he alleged that he had paid, was held not to have proved payment merely by producing the bill with a protest on it, since it was said to be the usage of merchants that there should be

¹ Chitty, 456, 43 Geo. III. c. 126, § 5. This act authorises any debtor paying a debt to present to the creditor a proper stamp that he may write a receipt on it, and the creditor is required to grant the receipt, under a penalty of £.10 for each instance of neglect.

² *Antea*, 281, *et seq.*

³ *Per* Lord Ellenborough in *Burbridge v. Manners*, 3 Campb. 195.

⁴ *Antea*, 389.

⁵ *M'Farlane v. Watt*, 15th Feb. 1828, 6 S. D. 560.

⁶ *Smith v. Battens*, 2 M. and Rob. 341.

⁷ *Antea*, 388-9.

⁸ *Antea*.

also a receipt on the protest; but Holt, C. J., seemed to think that any other proof of payment would have been sufficient¹. In Scotland, a written receipt would have been required. In a case, where it appeared from a receipt on the bill that it had been paid by the indorser, the mere circumstance of the drawer being afterwards in possession of it, without a receipt by the indorser to him, was found not to found a presumption that he had repaid it to the indorser, or to give him a claim for it on that ground against the acceptor². The bill being dishonoured *ex facie*, the drawer had no interest in it, without evidence that he had repaid its amount to the person who appeared to have first paid it.

It has been already shewn³, that a bill or note, except in certain cases of notes payable on demand, cannot be re-issued after being paid by the acceptor or granter, and that even a drawer who has paid a bill cannot re-indorse it, though he may demand indemnity from the acceptor⁴.

A receipt on a bill written by the creditor, and found among his papers after his death, will not afford evidence of payment; because, as the bill was not delivered, the receipt must be presumed to have been written merely *spe numeranda pecunie*⁵. The debtor ought, therefore, in all cases, to insist on delivery of the bill or note when he makes payment. So long as it is out of his possession, he may be liable to a demand for second payment⁶. A bill or note delivered with a receipt "to account of it," is effectual, unless redargued by the debtor's writ or oath, and cannot be met by parole evidence, that the receipt was granted by mistake, and that the payment was made on another account⁷.

2. Indirect evidence of payment.

Besides a formal receipt, there are other means of proving payment, which seem to resolve, either into the evidence afforded by the creditor's own writ, (or oath,) or into cir-

¹ *Mendez v. Careroon*, 1 Raym. 742.

² *Alston's Assignee v. Mather and Peacock*, 27th Jan. 1824, 2 Shaw, 648.

³ *Antea*, 265-6.

⁴ *Antea*.

⁵ *Cochran v. Pringle*, 20th July 1709, Morr. 12714.

⁶ *Hart v. Newman*, 3 Campb. 13; *Buzzard v. Flecknoe*, 1 Stark. 333; *Brombridge v. Osborne*, 1 Stark. 374; *Woodroffe v. Hayne*, 1 C. and Pay. 600.

⁷ *M'Farlane v. Stott*, 15th Feb. 1828, 6 S. and D. 56, F. C.

cumstances independent of writing, which instruct payment *rebus ipsis et factis*. The following are instances of the first of these modes. In a case ¹, where a person charged as cautioner in a bond, suspended, on the ground that the bond had been given in consideration of two bills granted by the charger to the principal obligant, the payment of these bills was held to be instructed by the payee's books, joined to some other adminicles of evidence. In another case ², where an action was brought against a tenant on a bond, and a bill or precept, it was held that a fitted account in the tenant's possession, drawn out by the landlord's factor, though not subscribed by him, and in which both debts were marked as paid, formed good evidence of payment against the landlord. Again ³, where an action was brought on a bill for the rent of a particular year, the production of three subsequent consecutive receipts for rent, the last of which discharged all precedings, with the circumstance of no claim having been made by the original payee for several years till his death, was held to prove payment. In an action ⁴ by the representative of the creditor in a bill against the acceptor, though the bill was still in the pursuer's possession, it was decided that certain jottings on it, holograph of the creditor, from which it appeared that the whole had been paid excepting a balance of £.63, 10s., formed good evidence; the creditor's books proving that he had no other transactions with the defender, and it being improbable that he would insert an extraneous account on the bill. Payment may also be proved by the creditor's oath. But it must be taken with the qualifications annexed to it. For instance ⁵, where the creditors, on such a reference, admitted that they had got in payment a conveyance to certain shares of a vessel, but added, that the free proceeds amounted only to £.43, it was held that the oath must be taken with this qualification. It was not extrinsic, as in some cases, to be afterwards mentioned, of parties who, on the subsistence of a debt being referred to them, depone that it is compensated by a counter

¹ Skene v Lumsden, 4th Feb. 1662, Morr. 12620.

² Ainslie v. Chisholm, 13th Feb. 1696, Morr. 12626.

³ Homes v. Anderson, 5th Dec. 1744, Morr. 11401.

⁴ Watson v Smith, 9th Feb. 1709, Morr. 12713.

⁵ Stewart and Hamilton v. Telfer and Company, 1 Sh. 101.

claim, but formed an ingredient of the matter referred. When a creditor, pursuing for a bill, admits that it was granted for a certain account, the Court will not allow possession of the bill to exclude inquiry, whether some items of the account were otherwise discharged ¹.

Of the second kind of evidence now mentioned, viz. that of facts and circumstances, there is an instance in a case ², where the creditor in a promissory-note having allowed it to lie over without demand for five years and ten months, and there being other circumstances from which payment was to be presumed, the Court, though the sexennial prescription had not taken place, decided, that there was evidence of payment. It has been laid down in an English case ³, and the doctrine seems applicable in Scotland, that when the evidence of payment is doubtful, "the possession of the uncanceled security " by the claimant ought to turn the scale in his favour, since, "in the ordinary course of dealing, the security is given up to " the party who pays it." The possession, therefore, of a bill or note by the debtor will form one presumption that he has paid it. But the mere possession of a banker's check by the party who had granted it, and the circumstance of another banker's name being written across it, so as to point them out as the party to whom it was payable, was found not sufficient to prove, either that it had been paid in to this banker on account of a particular party, when there was no other evidence that this party had got its amount, or been credited with it in the banker's books; or to prove that the drawer, though it was now in his possession, had retired it ⁴. It has been also found, that the possession by a factor of bonds and bills granted by his constituent, without any discharge of them to him, did not found a presumption that he had paid them from his own funds, and therefore he was not allowed credit for them in an accounting with his constituent's representative ⁵. Farther, when a

¹ *Mills v. Hamilton*, 19th Feb. 1830, 8 S. and D. 570.

² *Russell v. Fraser*, 13th June 1788, *Morr.* 11390; *vide* a case of payment of a bill inferred from facts and circumstances, in *Crichton v. Watt*, 11th July 1833, 11 S. D. 964.

³ *Per* Lord Ellenborough, in *Brombridge v. Osborne*, 1 Stark. 374.

⁴ *Byer's Assignees v. Crossley and others*, 2 C. and Pay. 213.

⁵ *Viscount Garnock v. Wilson*, 22d July 1714, *Morr.* 11530.

master was in use to draw bills on his debtors, payable to his servant, that the latter might discount them with the bank, and indorse them on his account; but one bill, in consequence of the drawee refusing to accept it, had not been discounted, and remained unnoticed in the servant's custody till his death, when his executors brought an action for it against the master, (though the servant had neither made use of it, nor taken notice of it in his settlement, in which more trivial things were mentioned,) the Court decided that this bill must be understood to have been drawn for the master's behoof, and that therefore the servant could have no more right to it than to his master's money deposited with him. They also held that this case did not fall under the act 1696, c. 25, which required trust to be proved by the trustee's writ or oath; but that a presumption of trust was created by the course of dealing between the parties¹. The possession of a bill, however, by the proper debtor, will, in general, create a presumption *per se* that he has paid it, although this presumption may be redargued by evidence that he has got it by accident or fraud. This was found by the Court in a case², where a bill, having been abstracted from a messenger with whom the creditor had placed it, and having got into the debtor's hands, not without suspicion of fraud, the creditor was found entitled to re-delivery of it.

¹ M'Laren and Din v. Chesly's Executors, 8th Feb. 1710, Morr. 12756. Vide Jackson v. Monro, 2d Dec. 1714, Morr. 16197, where trust was presumed from circumstances, (as to a bill,) without the proof required by act 1696, c. 25.

² Edward v. Fyfe, 26th June 1823, 2 S. and D. 431.

SECTION VI.

Payment by Mistake.

If a person has paid money under a misapprehension of facts, without being legally bound, he may recover it, when the holder has been guilty of wilful concealment. For instance, when the holder of a check, which was postdated, and consequently void, presented it to the bankers on whom it was drawn, in the knowledge of that circumstance, and also of the insolvency of the drawers, but without mentioning these facts, and the bankers were led, by his concealment, to pay the check, though they had not then funds of the drawers in their hands, they were found entitled to recover back from him the money so paid ¹. A person is likewise entitled to recover back, even from the *bona fide* holder of navy bills and victualling bills, money paid by him without consideration, in consequence of the fraudulent insertion of sums beyond those for which the bills were granted ². It was here held, that the party who had got value to the apparent amount of those bills, was bound to warrant that amount, or to refund the difference. So, the indorser of a bill was found entitled to recover back its amount from the indorsee, on discovering that the latter had not given notice of the non-payment, in due time after receiving it ³. In a case ⁴, also, where the indorser of a bill, who had given it to the indorsee in payment of a previous debt, paid this debt to the latter, though he knew that he had not negotiated the bill, in the belief that it was void for want of a proper stamp, he was found entitled to repetition, on discovering, what he had no means of knowing at the time of payment, that it had been drawn in Ireland, where the stamp was legal. The rule laid down in this case appears to have been, that a party cannot recover back a payment made under a mistake in law, but that he may, if it is made under a mistake as to a fact, which

¹ *Martin v. Morgan*, Gow, 123; 3 Moore, 635.

² *Bruce v. Bruce*, and *Jones v. Ryde*, note 1.

³ *Batchin v. Orr*, June 1792, *Morr.* 1619.

⁴ *Milnes v. Duucan*, 6 B. and Cr. 671.

he neither knew, nor had the means of knowing. But he has no claim for repetition against any other party to the document¹. A person accepting and paying one bill, and then paying another drawn by the same person to the same *bona fide* holder, cannot recover back the amount of the last bill, on the ground that the drawer's signature is forged; as he ought to have ascertained this fact before he gave either of the bills credit by accepting and paying them². It has been also decided³, that bankers could not recover back money paid by them on account of a customer, under an acceptance of his which turned out to be forged, seeing they ought to have ascertained whether it was genuine before paying the bill. But they are not bound, (however much it may be for their interest,) to ascertain the genuineness of an acceptance before discounting a bill; but, if the bill should turn out to be forged, are entitled to recover its amount from the party to whom they discounted it, by virtue of his indorsement⁴. It was not even admitted as a defence, that he had discounted the bill merely as agent for another party, to whom he paid the amount before hearing of the forgery. In another case⁵, where the holder of a bill presented it to the bankers of one of the supposed indorsers, that they might pay it for his honour, which they did, they were found entitled to recover back the amount from the holder, on this indorsement turning out to be a forgery, as his conduct in presenting it had led them to believe that it was genuine, and as they had demanded repetition the same day that they paid it. It was decided, however, that they could not recover, when they did not demand repetition till the next day, it being held that they were bound to make the claim the same day, so as to enable the holder to have immediate recourse against the other claimants⁶. These cases were distinguishable from two cases of navy bills and victualling bills already noticed, because, in the former, the bankers were bound to ascertain the genuineness of the signature of their

¹ *Post*, on Negotiation.

² *Price v. Neal*, *antea*, 359, note 4, and other cases therein cited.

³ *Smith v. Mercer*, *antea*, 74, note 5.

⁴ *Fuller and others v. Smith*, 1 C. and P. 197.

⁵ *Wilkinson v. Johnson*, 3 B. and Cr. 428.

⁶ *Cocks and others v. Masterman*, 9 B. and Cr. 902.

own customers, whereas, in the latter, there were no grounds for such an obligation. The cases of payment made by a banker through mistake to a wrong person, and of payment of a check made by the banker after the drawer's death, but before he knew of it ¹, as well as of payment made under an unauthorised indorsement ², have been already considered.

It would appear, notwithstanding the opinion already noticed ³, that a party paying through mistake is entitled to repetition from the person to whom payment was made, though it arose from a mistake in point of law ⁴.

Although a party has got money from the acceptor of a bill to satisfy it, he will be entitled to plead any objection to the title of the holder, which could have been pleaded by the acceptor, for instance, in England, that the original payee indorsed it to him after committing an act of bankruptcy, in which case, he holds the money for behoof of the other creditors ⁵.

It is laid down in the earlier writers on bills, and even in a modern author ⁶, that payment of a bill by the acceptor, unless it bears expressly to be "for value received," gives him a claim of indemnity against the drawer. But this notion proceeds on the old doctrine, that the drawee accepts merely as the drawer's mandatary, and has therefore an action *ex mandato*, in consequence of his acceptance. It has been already explained, in opposition to this doctrine ⁷, that the drawee, by accepting, acknowledges himself to be the drawer's debtor, whether the bill contains the words "for value received," or not, and that therefore his payment of the bill, being only a discharge of his debt, can give him no claim against the other parties. If he has accepted for the drawer's accommodation, this can only be proved by the latter's writ or oath, and, in

¹ *Antea*, 376-7.

² *Antea*, 258.

³ 402-3.

⁴ *Ersk.* iii. 3. 54. *Vide* also opinion of the Court in *Carrick v. Carse*, 5th August 1778, *Morr.* 2931. In this case, a party was reponed against a payment made under a cautionary obligation, in respect of the lapse of the seven years. He admitted that he knew the law on this subject, but alleged that he was ignorant of the fact. The Court held that he was equally entitled to redress against the mistake, whether it had arisen from ignorance of the law or of the fact.

⁵ *Redshaw v. Jackson*, 1 *Campb.* 372, *per* Lord Ellenborough.

⁶ *Glen*, 181, 2d edit.

⁷ *Antea*, 89, *et seq.*

CAN ACCEPTOR WHO PAYS CLAIM INDEMNITY ? &c. 405

that case, his claim of indemnity must be pursued, not on the bill, but in a separate action.

The claims of recourse arising to the drawer, and other parties, in bills or notes, from their payment of them, shall be afterwards considered, in the Chapter on Action and Diligence.

CHAPTER VI.

OF THE NEGOTIATION OF BILLS AND NOTES, AND THE
CONSEQUENCES OF FAILURE IN DUE NEGOTIATION.

WE must now suppose that the drawee of a bill refuses to accept, or that the drawee of a bill or granter of a note fails to pay. The holder is then entitled to sue the drawer, or any of the indorsers immediately¹, for the amount of the bill or note; but only on shewing, that he has done all which is required for due negotiation. It will likewise, in general, exclude his claim against subsequent parties to a bill or note, if he has released, given time, or innovated the debt in favour of a prior party against whom they had a claim of recourse. This part of the subject, therefore, includes all the requisites of negotiation, as well as the consequences of failure in negotiation, and the question how far discharge or indulgence given to one party will release others. We shall consider,

I. The requisites of presentment of bills or notes; 1. For acceptance; 2. For payment.

II. Protest, both for non-acceptance, and for non-payment.

III. 1. Acceptance } *supra* protest.
2. Payment }

This last subject, though not falling strictly under negotiation, has been included in it; because a previous explanation of presentment and protest is necessary to make it intelligible.

IV. Notice necessary on non-acceptance or non-payment, and in what cases it may be dispensed with.

¹ *Siggars v. Lewis, antea* 382, note 3.

In considering these different requisites, we shall discuss the consequences of failure in any of them, which resolve generally into the loss of recourse.

V. Effect of novation, release or indulgence to any one of the obligants on the holder's claim against the other obligants.

In discussing these points, it shall be considered how far the doctrines with regard to them are modified by the circumstance of the bill or note being accepted, granted, or indorsed without value, or, in other words, being an accommodation-bill or note.

SECTION I.

*Presentment.*1. *Presentment for Acceptance.*

1. At what time?

Presentment of promissory-notes is held to mean only presentment for payment, no separate presentment for acceptance being required¹. As to bills, a bill payable on a precise day, or within a certain time after its date, need not, in general, be presented till it becomes due². The drawer being certiorated of the term of payment, is bound to have funds *at that time* in the drawee's hands to answer it; and it is his business to secure the drawee's acceptance if the bill should be presented, by either putting him in funds immediately, or satisfying him that he will be in funds before the term of payment. There is an exception, however, to this rule, when the holder of a bill is merely agent for the creditor; because, till acceptance, the creditor has no security for payment but that of the drawer, and would therefore have a claim against his agent, if, through his neglect, the drawer should become insolvent before the drawee accepts³. Accordingly⁴, where an agent for a bank at Greenock discounted a bill there, and then transmitted it to the bank agent at Glasgow, where the drawee re-

¹ *Sutton v. Toomer*, 7 B. and Cr. 416; 1 M. and Ryl. 125.

² *Beawes*, No. 266; *Molloy*, 2, 10, 16; *per* Lord Mansfield, C. J., in *Bleasard v. Hirst*, 5 Burr. 2672; *per* Gibbs, C. J., in *O'Keefe v. Dunn*, 6 Taunt. 621-2; *per* Lord Ellenborough in *Orr v. Maginnis*, 7 East. 359. In Scotland, in *Ferguson v. Malcolm*, 16th Feb. 1727, *Morr.* 1558, the Court found "that the bill being drawn payable on a place and day certain, there was no necessity of a protest for non-acceptance." In *Jamieson v. Gillespie*, 28th June 1749, *Morr.* 1579, after a report of merchants as to the practice, it was held sufficient negotiation to protest for non-acceptance as well as non-payment of a bill of this kind, within the days of grace. The same thing was held in *Philpott v. Bryant*, 3 C. and Pay. 244.

³ This doctrine is well explained by Pothier, No. 128. *Vide* also Marius, 46. This last author, indeed, holds that a person is bound to present for acceptance, in all cases, whether he is factor for the payee or not.

⁴ *Dunlop v. Hamilton and Co.* 16th Jan. 1810, F. C., 1 Bell, 409, note 2.

sided, to get it accepted, which, according to the practice, it was his duty to do, but the Glasgow agent neglected to do so for four days after receiving it, viz. till the day of payment, when the drawer had failed, in consequence of which the drawee refused to accept, he was found liable on that account for the bill, under deduction of a dividend from the drawer's estate. One argument for him was, that it was customary not to present bills drawn at so short a date, (four days,) for acceptance, but to keep them till the day of payment. But this argument was disregarded. Even the payee is bound to present the bill immediately for acceptance, if the drawer has desired him to do so ¹. Such presentment, indeed is advisable in all cases; because, if the bill is accepted, it becomes thereby more negotiable ²; whereas, if acceptance is refused, the holder has immediate recourse on the drawer ³. When a bill is payable at a certain time after sight, presentment for acceptance is necessary, to fix the term of payment ⁴. But such presentment is not necessary, if the bill is drawn on too low a stamp; because it is then null ⁵, and the holder may sue on the consideration for which it was granted, though he has neglected to present it ⁶. He will have no ground of action, if his claim rests on the bill alone.

¹ Chitty, 300; 1 Bell, 409.

² Marius, 48; Beawes, No. 266.

³ Ballingall v. Glosters, 3 East. 481; Allan v. Mawson, 4 Campb. 115. In both these cases, a claim of recourse made against the drawer immediately on the non-acceptance of the bill, was sustained. In Cowan v. Kay, 20th June 1795, Merr. 1621, a bill having been protested for non-acceptance, a charge upon it against the drawer was found competent, though given prior to the term of payment.

⁴ Per Eyre, C. J., and Buller, J., in Muilman v. D'Eguino, 2 H. Bl. 562.

⁵ Wilson v. Vysar, 4 Taunt. 288.

⁶ In Ruff v. Webb, Esp. 125, where the plaintiff had taken, in payment of a debt, an unstamped document which was held to be a bill of exchange, but had never presented it for payment, Lord Kenyon, in respect that it was not stamped, and was consequently null, found that he was entitled to recur to the original consideration. In Swears v. Wells, 1 Esp. 317, where the plaintiff had agreed to accept in payment, 1st, A check, for which he accordingly drew the money; and, 2dly, A promissory-note, which turned out to be written on a wrong stamp, but where he afterwards brought an action for the amount of the promissory-note, as on the original consideration, before its term of payment arrived, Lord Kenyon held, that, as he had acted under the agreement by taking cash for the draft, and as it was an entire agreement, he ought to have

Although the bill should have no address, yet, if the holder is advised by the drawer who was meant as drawee, he ought to present it, and protest it on non-acceptance, that there may be recourse against the drawer ¹.

If a bill has been once presented for acceptance, but dishonoured, and the drawer admits the non-acceptance, but says that it will be accepted if presented a second time, he cannot plead want of negotiation though the bill should not be so presented, or argue that the holder, if he did not choose to present it again, should have returned it ².

As to the time when a bill payable after sight should be presented for acceptance, the only rule is, that the holder ought to use no undue delay, but should present within a reasonable time ³. Unless there were some restriction, the drawer could not know how long he should keep funds in the drawee's possession to answer the bill, if it was not presented, or he might suppose, if he heard nothing to the contrary, that it had been accepted and paid, and might thus be led to credit the drawee with a proportionally larger sum. The doctrine, therefore, that the holder of a bill payable after sight may use his discretion as to the time of presenting it, is now exploded. Such a doctrine was maintained in Scotland in an early case ⁴, where it was found that a bill on London, payable at fourteen days' sight, was duly negotiated, when not presented till 22d June, though it must have reached London on 12th June. In a subsequent case ⁵, the same argument was urged, and

fulfilled it altogether, by either waiting till the term of the note expired, or applying for a new note, and therefore he was non-suited. In Scotland, however, the agreement would probably have been held altogether invalid, in so far as regarded the note; because, being unstamped, it could not warrant an action even for a new note; and therefore the plaintiff, having no right *under it*, would have been found entitled to recur immediately to the original consideration.

¹ Marius, 142-3.

² Hickling v. Hardy, 7 Taunt. 312, *per* Dallas, C. J.

³ Pothier, No. 143; Bayley, 227; *per* Bayley, J., in Muilman v. D'Eguino, 410, note 4. The same doctrine is fully explained by Forbes, 65-6.

⁴ Innes v. Gordon, 7th Feb. 1735, Morr. 1562; Elchies, No. 6, v. Bill. Mr Forbes, 67-70, lays down the rule nearly as it is now established, regarding bills payable at or after sight, as well as those payable after date.

⁵ Andrew v. Syme and Co., 21st Nov. 1759, Morr. 1584.

the Court held that there was sufficient negotiation. But they probably proceeded on the circumstances of the case, which afforded a good excuse for the delay. In another case¹, where the holders of a bill drawn at three days' sight had received and transmitted it for acceptance on 7th May, but allowed it to remain in the drawee's hands, without getting his answer or protesting it, or giving notice to the indorser till 5th June, though the drawee himself protested it for non-acceptance on 31st May, the Court decided that recourse was lost. They seem to have held that the protest was the only proper evidence of presentment. The grounds of decision are not specified; but the indorser argued, that even bills payable after sight must be presented within a reasonable time. No distinction has been ever made on this point between foreign and inland bills, in Scotland or in England. But the application of the rule depends on circumstances. The holder of a bill payable after sight will lose his recourse, if he keeps it locked up for a length of time without presenting it². But it has been held, that a person receiving at Windsor a bill of this kind drawn on London negotiates it duly, though it has not been in circulation in the mean time, if he presents it on the fourth day after receiving it³; and, with regard to a bill by country bankers on their London correspondents at twenty days' sight⁴, it has been held that there was no undue delay, though it was received on 17th November, and not sent off for Bristol till the 24th, in consequence of which it did not reach London till the 29th. As to bills drawn on India at sixty days' sight, it has been decided⁵, under special circumstances, that they were duly negotiated, though not formally presented for acceptance till twenty-six days after their arrival; the drawee, however, having had notice, and having been requested to accept them

¹ *Falls v. Porterfield*, 17th June 1766, *Morr.* 1593.

² *Per Buller, J.*, in *Muilman v. D'Eguino*, 410, note 4.

³ In *Fry v. Hill*, 7 *Taunt.* 397, the verdict of a jury to this effect was confirmed by the Court of C. P., the Court holding that the question was properly left to the jury.

⁴ *Shute v. Robins*, 1 *M. and Malk.* 133, 3 *C. and Pay.* 80.

⁵ *Muilman v. D'Eguino*, 2 *H. Bl.* 565.

two days after their arrival. In the same case, it was held, that there was no undue delay in not sending the bills from this country to India for acceptance, from 5th March to 30th April, the plaintiffs being, during that interval, in correspondence about them with a house in Paris, for whose behoof they had taken them, and having transmitted them as soon as they received directions on the subject. In a later case¹, where a foreign bill payable at sixty days' sight, and at a rate of exchange amounting to 22d. *per* milrea, had been purchased on 10th September, and not sold again till 1st February, (the rate of exchange having begun to fall immediately after the purchase, and having fallen, before 1st February, to 17d. *per* milrea,) it was held, that the plaintiff had not retained it an unreasonable time, so as to bar him, on the drawee's failure, from claiming its amount against the drawer, and that he was entitled, in a falling market, to keep it a reasonable time with a view to the price rising, so as to indemnify him against loss. It was stated to be usual, when the drawee wished to limit the time, that he either sent another part of the bill for acceptance, or stipulated, on a sale, that it should be transmitted within a certain time, and it was inferred, that, as he had not done so here, he must have taken his chance of its being retained a reasonable time.

The holder of a bill payable after sight, whether foreign or inland, may put it into circulation before acceptance², and it must then depend much on the continuance of its circulation when it should be presented for acceptance. In one case³, it was decided, that foreign bills drawn at thirty days' sight, which, having been put into circulation, were not presented for acceptance till some months after being issued, had been duly negotiated, though the drawees had continued to honour the drawer's bills for forty days after their date, and though the drawer did not fail till that period had elapsed. Courts have refrained from limiting any time within which bills of this kind, when thus put into circulation, must be presented; holding that this must be determined by the circumstances of

¹ *Melish v. Rawdon*, 9 Bingh. 416; 2 M. and Scott, 570.

² *Per* Gibbs, C. J., in *Fry v. Hill*, *antea*, 412, note 3.

³ *Goupy v. Harden*, Holt, C. N. P. 342, 7 Taunt. 159.

each case¹. It has been even laid down, that such a bill might be safely kept in circulation for a year without presentment².

According to the authorities already cited³, which appear rather to lead to the conclusion, that bills drawn at sight are not payable on demand, but that days of grace should be allowed on them, it follows, that they must be first presented for acceptance, to determine the currency of the days of grace. It has been also held, even as to a note payable on demand "at sight," that no action can be maintained on it without proving presentment for sight⁴. The rules now laid down as to the time of presenting for acceptance bills payable *after* sight, appear to be equally applicable in this case.

It has been much disputed in England, whether the question, what is a reasonable time for presentment, is proper for a jury, or is a question of law for the Court⁵. Perhaps the only attainable conclusion is, that it is very liable to be affected by the circumstances of each case, but that, in situations which admit of a general rule, a rule ought to be laid down and adhered to⁶. But this is a point not peculiarly connected with the law of Scotland, and on which I will not hazard an opinion.

Presentment should, in all cases, be made at a seasonable time of day; and when the drawee is a banker or merchant, it ought to be made during the usual hours of business⁷.

¹ *Per* Gibbs, C. J., in *Goupy v. Harden*, 413, note 3; and *per* Eyre, C. J., in *Muilman v. D'Eguino*, *antea*, 410, note 4.

² *Per* Buller, J., in *Muilman v. D'Eguino*, *ibid.*

³ *Antea*, 377-8.

⁴ *Dixon v. Nuttall*, 4 Tyrwh. 1013.

⁵ *Vide* on one side *Muilman v. D'Eguino*, *antea*, 410, note 4, and *Fry v. Hill*, 412, note 3, where this is held to be a question for the jury. On the other hand, in *Darbishire v. Parker*, 6 East. 12, 13, the question, What is a reasonable time for notice of dishonour, which depends on the same principle, is said, by Lawrence, J., to be a question of law, while the other Judges seem to hold that it is a question of law depending on the facts.

⁶ *Vide* Lord Mansfield's opinion in *Tindal v. Brown*, 1 T. R. 168, and that of the majority of the Court in *Darbishire v. Parker*, note 5; also *Shute v. Robins*, 1 M. and Malk. 133.

⁷ *Vide* on this subject Marius, 112, who gives some curious details as to the hours of business in London during his time. The same rule was laid down in *Parker v. Gordon*, 7 East. 385, with regard to the obligation of a party who had taken a bill payable at a particular banking-house, to present it during the

The failure to present in due time may be excused by any sufficient reason not arising from the holder's misconduct, such as illness, intervening war, unavoidable detention, &c. ¹.

2. To whom and where?

Presentment, to be effectual, must be made to the drawee himself, or to his authorised agent ². A bill drawn on a banker or trading company ought to be presented to them at their place of trade, within the ordinary hours of business ³; when it is drawn on an individual, it may be presented to him either at his place of business during business-hours, or at his dwelling-house, or personally, if no place of payment, is expressed ⁴. If a bill is made payable by the acceptor at a bank, presentment there, though not made to him personally, is sufficient ⁵. If the drawee cannot be found at the place described in the bill as his residence, and it appears that he never lived there, or has absconded, the bill ought to be immediately protested there for non-acceptance ⁶. But if the drawee has only changed his residence, the holder must use all endeavours to find out his new residence, and present the bill to him there as soon as possible ⁷. If he has left the kingdom, it has been

usual banking hours. As to the proper time of day for presentment, *vide* presentment for payment, the rules regarding which are applicable also to presentment for acceptance.

¹ For instance of a valid excuse, *vide* *Andrew v. Syme*, 411, note 5, and *Forbes*, 68-9; also *Muilman v. D'Eguino*, 410, note 4. In *Patience v. Townly*, 2 Smith, 224, it was held to be a sufficient excuse for delay in presenting a bill, that the town of Leghorn, where presentment ought to have been made, was then occupied by the enemy. Lord Ellenborough laid it down, that the rules as to due presentment were always subject to the exception of such unavoidable accidents as rendered it impossible.

² In *Check v. Roper*, 5 Esp. 175, where the witness called to prove presentment stated, that he went to the drawee's house, and offered the bill for acceptance to a person in his tan-yard, *who refused to accept*, (not being certain, however, that this person was the drawee,) Lord Ellenborough held, that presentment was not proved, and that therefore there could be no recourse against the drawer.

³ 1 Bell, 412.

⁴ *Id.* 413.

⁵ *Hawkey v. Borwick*, 1 Yon. and M'L. 376, affirmed on error in Exchequer-Chamber, 4 Bingh. 135.

⁶ *Chitty*, 307. In *Anon.* Raym. 745, it is laid down as the custom of merchants, that if the drawee absconds before the day of payment, there may be a protest immediately for better security, and a protest afterwards for non-payment, on the arrival of the term of payment, but not sooner.

⁷ In *Collins v. Butler*, 2 Str. 1087, it was held, that the indorsee of a pro-

held sufficient in England to present the bill at his house¹. In Scotland, if the drawee cannot be found, it has been said that the holder should present and protest the bill at the market-cross of the place where he last resided². In this case, the protest ought to bear, that strict search has been made for him³. But if there is some person who represents him in this country, presentment ought to be made to him⁴. If there are two persons of the drawee's name and designation, and neither will accept, a protest ought to be taken against both⁵.

It has been said, that if the drawee is dead, the holder should present it to his nearest heirs, and protest it on their refusal to accept, though they have not yet taken up his succession⁶. This should certainly be done where the drawee's heirs have taken up his succession. But otherwise, there is no person representing him, as to the bill, and the presentment of it to them appears as futile as if made to a stranger. In such a case, it seems necessary that the holder should, within a reasonable time, notify to the other parties the drawee's death, by which presentment has become impossible. When the creditor is dead, and his heirs have not taken up his succession, it has been stated, that they also are bound to

missory-note suing the indorser, had not established enough to make good his recourse, by merely proving that the maker's house was shut up, because he was bound to have inquired after him and presented the note. It was laid down as settled, that the maker of a promissory-note is in the same situation with the acceptor of a bill. The same general doctrine was held regarding ignorance of a party's residence, when stated as an excuse for not notifying to him the dishonour of a bill, in *Bateman v. Joseph*, 2 Campb. 461, 12 East. 433; *Beveridge v. Burgess*, 3 Campb. 262, and *Browning v. Kinnear*, 1 Gow, 81.

¹ This was ruled by Lord Ellenborough, in *Cromwell v. Hynsorn*, 2 Esp. 311, where the bill was presented at the drawer's house to his wife, who was also fully apprised of all the circumstances, while he was in Jamaica.

² 1 Bell, 409, referring to *Forbes*, 120.

³ *Forbes*, 120.

⁴ 1 Bell, 413. In *Firth v. Thrush*, 8 B. and Cr. 397, the same doctrine is implied with regard to notice.

⁵ *Vide Phillips v. Astling*, 2 Taunt. 206, which, however, is not exactly the case stated in the text, because, in that case, the drawee's sister, being his authorised agent, *had accepted the bill* during his absence; and the objection was, that it had not been afterwards presented to her for payment. This objection was sustained.

⁶ *Pothier*, 146. *Molloy*, 2, 10, 36, lays down this rule with regard to protest for non-payment, when the drawee has died after acceptance.

present for acceptance and payment, and to protest for non-acceptance and non-payment¹. But the sounder opinion appears to be, that they are not bound, as there is no party entitled to demand payment and grant a discharge, or to protest for non-acceptance or payment². It has been, indeed, held, that the mere possession of a bill is a warrant to present and protest for non-acceptance. But possession merely creates a presumption, that the possessor is authorised to act for the creditor, which presumption his death does away.

The time during which a bill may be left with the drawee, that he may deliberate whether he will accept or not, as well as the measures which are advisable in case of his asking longer time, have been already considered³. It has been said⁴, that, if the bill be lost, while in the drawee's custody, by him or his servants, the creditor should demand a note from him for payment of the amount at the specified term; and, on his refusal to grant it, should immediately take a protest for non-acceptance, and give notice to the drawer, following likewise the same course, as for non-payment, on the arrival of the term of payment.

Bills must be presented at the same place for acceptance and for payment, and therefore this matter shall be afterwards considered with reference to both subjects.

2. *Presentment for Payment.*

It has been already shewn that presentment for acceptance is not necessary with bills payable on demand, or at a specified time. But they must be duly presented for payment to the drawee or granter, in order to establish recourse against the other parties⁵, and such presentment, as well as the drawee's failure to pay, must be properly instructed⁶. In Scotland, the only admissible proof of this is a protest, of which afterwards. Such presentment appears to be also necessary, with bills or notes payable at or after sight, or on

¹ *Marius*, 134-5.

² *Molloy*, 2, 10, 34.

³ *Antea*, 332.

⁴ *Beawas*, No. 17.

⁵ In *Collins v. Butler*, 2 Str. 1067, it was found, *inter alia*, that payment of a note ought to have been demanded from the maker, before charging the indorser:

⁶ *Giles v. Powell*, 2 C. and Pay. 259.

demand, to complete the holder's claim even against the drawee or granter ¹.

1. Where—to whom—by whom ?

When the debtor in a bill or note cannot be found, the same rules appear to be applicable to presentment for payment, which have been explained as to presentment for acceptance ². But it has been also decided ³, that presentment for payment at the acceptor's house, with refusal, though the acceptor was not found personally, is sufficient to preserve recourse, it being held, that the acceptor was bound to have funds there to make payment. It has been decided in England ⁴, that the circumstance of a banking company shutting up their bank, and thereby refusing to pay their notes, does not amount to a declaration that they will not pay certain specific notes sued for, which are payable on being presented at their bank, and, consequently, does not supersede the necessity of presentment, in order to give the holders a complete claim against them. Their mere insolvency, though thus declared by themselves, does not dispense with the necessity of presentment. But a timeous offer to return the notes of a bank which has failed to the party from whom they were received, is sufficient, without presenting, to preserve recourse

¹ *Antea*, 438-9. In *Holmes v. Kerrison*, 2 Taunt. 323, it was held that the statute of limitations on a note payable after sight could not take effect, as there was no cause of action from which the limitation could run without presentment, which had not been proved. In Scotland, in *Stephenson v. Stephenson's Trustee*, 16th June 1807, *Morr. App. v. Bill*, No. 20, it was found, that the sexennial prescription on a bill payable on demand runs from its date, in respect of the words of the act, by which the prescription runs from the time when bills or notes are exigible. Whether the same rule applies to bills or notes payable at or after sight shall be afterwards considered.

² *Antea*, 415-16.

³ *Per* Lord Kenyon in *Brown v. M'Dermot*, 5 Esp. 265.

⁴ *Bowes v. Howe*, 5 Taunt. 30. In this case the point was decided on an objection to the declaration, as not averring presentment, under the circumstances stated in the text. The objection had been repelled in the Court of King's Bench; but their judgment was reversed, on a writ of error, in the Exchequer Chamber. A similar decision was given in *Camidge v. Allenby*, 6 B. and Cr. 373, as to the recourse of a party on a note by a banker, which he had not presented, having got the note after the banker failed, and as to which he had given no notice to his author. The same point was also ruled in *Rogers v. Langford*, 3 Tyrwh. 654.

against him ¹. When the drawee of a bill has gone abroad, and left an agent in England with power to accept bills for him, and the agent has accordingly accepted a particular bill, it ought to be presented for payment to the agent, if the principal is absent when it becomes due ².

It has been said, that, if the drawee of a bill or maker of a note is dead, presentment for payment ought to be made to his executors, or, though there are none, that the document should be presented at his house, and protested for non-payment³. But, where the bill or note is made payable at a particular place, presentment there, even in this case, is sufficient⁴. The remarks which have been made on this subject as to presentment for acceptance, seem applicable to presentment for payment⁵. The case of the holder's death, and the measures to be thereupon adopted, have been already discussed⁶.

What has been said regarding the non-presentment for acceptance of bills unstamped, or illegally stamped, and also as to the excuses arising from the impossibility of presenting for acceptance, is applicable to the presentment of bills or notes for payment⁷.

It has been stated, that, when a bill is attached under an extent before it is due, and the party holding it for the Crown fails to present it in time for payment, the drawer and indorsers will still remain liable, because no laches are imputable to the Crown⁸. It has been even held, that the drawer and indorsers of a bill granted for the Crown, for instance, by way of remitting the public revenue, will be liable, although the bill should not be presented in due time to the drawer. But some kind of presentment must be necessary, even in this

¹ *Henderson v. Appleton*, reported in *Chitty*, p. 388, note *a*, and in *Rogers v. Langford*, 3 Tyrwh. 660.

² This was decided in *Phillips v. Astling*, *antea*, 416, note 5; also in *Bank of England v. Newman*, 12 Mod. 241, *per* Holt, C. J., who held, "that a demand of a servant of the drawer, who used to pay money for him, was a good demand."

³ *Chitty*, 389; *Molloy*, 2, 10, 34.

⁴ *Philpott v. Bryant*, 3 C. and Pay. 244.

⁵ *Antea*, 415

⁶ *Ibid.*

⁷ *Antea*, 410-15.

⁸ *Chitty*, 390; *West on Extents*, 29-30.

case, because the drawer and indorsers are not liable unless the drawee fails to pay¹.

We have already considered what is the law regarding the obligation of payment on the debtor in a bill or note, with or without presentment, when no place of payment is specified². But the drawer and other parties are not bound to pay, unless the bill or note has been first presented to the proper debtor for payment, and he has withheld it³, so that, although no place of payment is specified, there cannot be recourse against them, without presenting the bill or note to the debtor, if he is to be found, or at his residence. This is indispensable, unless he himself has in his acceptance specified some other place of presentment⁴. It has been⁵ also held, that, when a place of payment is specified in the body of a bill or note, the presentment of it at that place forms a condition of the contract; and that, therefore, without it, the holder can have no claim against the drawer and indorsers, or even against the acceptor or granter⁶. More

¹ West, 29-30.

² *Antea*, 384.

³ *Vide Syderbottom v. Smith*, 1 Str. 649, where the holder of a promissory-note failed in an action against the indorser, under the direction of Eyre, C. J., "because the plaintiff had not proved diligence to get the money of the drawer, "being of the old opinion, that the indorser only warrants upon the default of "the drawer."

⁴ *Sedgwick v. Jager*, 5 C. and Pay. 199.

⁵ The rule first here stated was held by the whole Court of King's Bench in *Sanderson v. Bowes*, 14 East. 500, where, in the case of promissory-notes payable on demand at a particular place, the Court held the declaration incomplete when it did not aver a demand at that place. The same doctrine was held, and the same decision given, under similar circumstances, in *Dickenson v. Bowes*, 16 East. 110. *Vide* also *Howe v. Bowes*, 16 East. 112. A similar decision was given by the Court of Common Pleas in *Bowes v. Howe*, *antea*, 418, note 4. In all these cases, the action was against the makers of the notes. It is not, therefore, easy to reconcile such decisions, the two first of which were given by Lord Ellenborough, with the opinion expressed by his Lordship at *Nisi Prius*, in the subsequent case of *Bowman v. Nicholl*, 2 Campb. 408, where, in an action by the indorsee against the maker of a promissory-note, which mentioned a certain place of payment in the body of it, he held; that this was not a part of the contract, but a mere memorandum of the place where payment might be made, and would not allow presentment there to be proved, lest such proof should be thought necessary. In a subsequent case, *Roche v. Campbell*, 3 Camp. 247, being an action by the indorsee against the indorser of a note which was made payable at a certain place, Lord Ellenborough held, that it was a fatal variance in the declaration not to mention the place,

récent decisions, however, have thrown doubts on this rule, at least so far as regards a claim against the maker of a note, or acceptor of a bill. It has been decided, that, when the place of payment, though marked only at the bottom of a note, has been printed before it is complete, presentment at that place is indispensable, even to found a claim against the acceptor; because the specification of place is "to be considered as part of the note, having been made at the time".¹ But a different doctrine is held, when such a memorandum was in writing, though written by the writer and granter of the note, at the time of making it.² When a bill has been drawn payable generally in London, and is accepted payable at a certain banker's in London, it has been held, even in an action against the acceptor, that this specification of place forms part of the contract, and that a presentment there must be proved.³

since it was thus implied that it was payable generally, whereas it was only payable at one house. But, whatever may be the import of these *Nisi Prius* decisions, the decisions above cited, pronounced both by the Court of King's Bench and of Common Pleas, must have higher authority.—Mr J. Bayley, in *Rowe v. Young*, 2 Brod. and Bingh. 242, expresses doubts as to the decision of *Sander-son v. Bowes*, although he says that he concurred in it. But it was confirmed by the judgment of the House of Lords in *Rowe v. Young*, which decided that even an acceptance, "payable at a certain place," was a restriction. *Vide* on this point, Bayley, 220.

The doctrine implied in the three first of these decisions was recently followed by Abbott, C. J., in the case of *Fayle v. Bird*, 2 C. and Pay. 303, where, in an action by the drawer against the acceptor of a bill payable in London, he non-suited the plaintiff, because he could not prove that the bill had been presented in London. The Court, however, granted a rule nisi for a new trial, on the authority of *Selby v. Eden*, 11 Moore, 511, (3 Bingh. 611,) where, in an action on a similar bill, it was held not necessary to aver in the declaration, that it had been presented in London. On arguing the rule for setting aside the non-suit, it was made absolute, on the ground of the case of *Selby v. Eden* having settled, that the act 1 and 2 G. IV. c. 78, applied to bills made payable at a particular place by the act of the drawer, as well as to cases where they were accepted payable at such a place; 6 B. and Cr. 631. It may therefore be doubted, whether the doctrine stated above can apply to claims against the acceptor of a bill, or granter of a note.

¹ *Per* Lord Ellenborough, in *Trecothick v. Edwin*, 1 Stark. 468, where the place of payment at the foot of the note, as well as the whole of it, except the sums, the parties' names, and the date, were printed. His Lordship held it necessary, under these circumstances, to prove presentment at the place specified.

² *Williams v. Waring*. 10 B. and Cr. 2.

³ *Per* Lord Ellenborough, in *Garnett v. Woodcock*, 1 Stark. 475. In this case the bill had been presented at the place specified between 7 and 8 P. M. of

It has been already shewn¹, that, when a bill is drawn payable generally in London, or any other place, the drawee must, in his acceptance, specify a particular house for demanding payment. This implied obligation, therefore, of the drawee being contemplated in drawing such a bill, his specification of the place of payment will be as much in view of parties, and will form as essential a part of the contract, as if engrossed originally in the bill. But, if the bill or note has been presented at the place specified, and payment refused, for instance, at a particular banking-house, it is not necessary to notify non-payment to the acceptor or maker, since he is not drawer, but proper debtor, and was therefore bound to ascertain whether the bill or note was paid when presented².

In all these cases, presentment at the place specified is still more necessary to give recourse against the drawer or indorsers, since they are not liable till the proper debtor is refused. In a question with them, it would probably be necessary to present the bill or note to the acceptor or granter at the specified place, though it should be merely noticed in a memorandum at the foot of the bill or note, as a place where payment might be made. This rule has at least been held applicable when the place of payment is specified only in the acceptance, as by accepting the bill "payable at a certain place³." The ground of it appears to be, that the drawee, by specifying a place for payment, indicated to the holder, that he would obtain payment there, and thus rendered presentment there necessary, at least in a question with the drawer or indorsers, who are not liable unless the acceptor has failed to pay. This doctrine seems applicable, though the place of payment should be indicated only by a memorandum annexed to the bill or note,

the day that it became due, and the answer was, no orders. It was pleaded that there was no presentment within proper banking hours. But Lord Ellenborough held, that, when a person attended and refused payment, the presentment was good, though it had been made at midnight. The necessity of presenting at the particular place was here taken for granted. The same doctrine was admitted in a similar case, *Hodge v. Fillis*, 3 Camp. 463.

¹ *Antea*, 342.

² *Per* Lord Ellenborough, in *Pearce v. Pembertley*, 3 Camp. 261.

³ Bayley, 220. In *Ambrose v. Hopwood*, 2 Taunt. 61, being an action by the holder against the drawer of a bill, which the declaration stated to have been accepted payable at a particular place, it was held to be fatal to the declaration, that it did not likewise specially aver presentment at that place.

and also, when the drawee or granter intimates, by his acceptance, or by a memorandum, that payment is to be made by a particular person, though not a party to the bill, as much as when he thus intimates that it is to be made in a particular place. It has been indeed suggested¹, that, as the 1 and 2 Geo. IV, c. 78, to be immediately noticed, enacted that acceptances, though they specify a particular place of payment, shall be accounted general acceptances to all intents and purposes, unless they declare that the bill is to be payable *if presented, only in that place, and not otherwise*, therefore, in the case of such general acceptances, presentment to the acceptor any where would be sufficient, though the bill should not be presented at the specified place. But presentment as a ground for recourse, is not merely co-relative with the acceptor's obligation; otherwise, he would, often, not be bound to present, as the acceptor is often bound, as already stated, to find out him and make payment. The object of presentment, as the foundation of a claim of recourse, is to ascertain that the acceptor has failed to make payment; and therefore, even when no place of payment is mentioned, it must, for this purpose, be made to the acceptor personally. So, when a place of payment is pointed out, though only in a memorandum, it is necessary, in order to ascertain that there will be no payment, to present the bill at the place specified, although the acceptor may be bound, as in any other general acceptance, without presentment there, or any presentment. This point has been accordingly thus settled, in a recent case².

Presentment for payment at the place specified in the acceptance, or in a memorandum, is sufficient against the drawer or indorsers, without going to the acceptor or granter personally; because, as he has thus pointed out the place where payment is to be asked, and where he is to have funds, his failure to pay there is a breach of engagement, such as to authorise recourse against the other parties, as if presentment were made personally³. As a sequel of this

¹ Chitty, 399.

² *Gibb v. Mather*, 2 Cr. and Jerv. 254.

³ *Sanderson v. Judge*, 2 H. Bl. 509; also *Parker v. Gordon*, 7 East. 385-7, *per* Lord Ellenborough. The same doctrine was adopted, since the 1 and 2 G. IV. c. 78, by the Court of Common Pleas, in *De Bergareche v. Pillin*,

doctrine, it has been also found¹, that, when a bill or note is payable at one or other of two places, presentment at one of them is sufficient to preserve recourse, when payment is refused there, on account of the failure of the house, though it would have been made at the other place, because the house there did not fail till a day or two afterwards. Nor does it make any difference, though the actual place of presentment is more distant than the other. It has been also found, that, if the banker whose house is specified as the place of payment is also holder of the bill or note, it is sufficient presentment by him to ascertain from his books whether the debtor has cash in his hands sufficient to meet it, the fact of his not having it being held to be a refusal of payment². It is implied, and has been held, in the cases already cited, as well as in others³, that the doctrine now stated is applicable, although the bill should be thus required to be presented for payment to a person not liable for it; for instance, to a banker at whose house the acceptor declares it payable, but who answers "no effects." It has been also judicially recognised as the practice of London, that, when a bill is declared payable there at a bank, the presentment of it to the banker's clerk at the clearing house is sufficient, without presenting it at the bank⁴.

It is not necessary, in order to found a claim against the acceptor of a bill or granter of a note, to present his bill or note for payment at a particular place, when it is only specified in a memorandum annexed to the bill or note; as such a memorandum is merely an intimation where payment may be had, and does not limit the debtor's obligation to pay, by the condition of presentment at the place specified. This doctrine has been decided or assumed in England, in every case where it has been the subject of discussion⁵. But the

3 Bingham, 476, in *Hawkey v. Borwick*, 4 Bingham, 135, and in *Hawkes and others v. Salter*, 4 Bingham, 715.

¹ *Beeching v. Gower*, per Gibbs, C. J., Holt, C. N. P. 313.

² *Sanderson v. Judge*, 2 H. Bl. 509; also *Parker v. Gordon*, 7 East. 385-7, per Lord Ellenborough.

³ *Stedman v. Gooch*, 1 Esp. 4.

⁴ *Reynolds v. Chettle*, 2 Campb. 596; *Robson v. Bennett*, 2 Taunt. 388.

⁵ It was taken for granted in *Sanderson v. Judge*, 2 H. Bl. 506, and Cal-

Courts were not so unanimous in their opinions as to the effect of an acceptance of a bill "payable at a certain place," when no place was specified in the body of the bill; this subject having divided the Court of King's Bench and Common Pleas for many years, till it was settled by a solemn judgment of the House of Lords, and afterwards regulated by statute. It was always admitted, that, when a bill is drawn without limitation of place, the holder is not bound to take an acceptance limited in this or any other respect. Farther, when an acceptance was thus qualified, "payable at a certain place, *and not elsewhere*," this was held to be a clear restriction, which made it necessary to present the bill at the place specified, in order to charge the acceptor. But the question was, Whether an acceptance "payable at a certain place," without adding the words "*and not elsewhere*," made the acceptor's liability depend on the presentment of the bill at that place? On the one hand, the Judges of the Court of King's Bench held, that such a note formed no condition restrictive of the acceptance, but was merely a memorandum, intimating where payment might be had, and that the drawee's general obligation to pay in terms of the bill, independently of presentment at this place, remained entire¹. On the other hand, the Court of Common Pleas held,

laghan v. Aylett, 2 Camp. 550, although the questions at issue in those cases depended on different principles. In *Wild v. Rennard*, note to 1 Campb. 424, referred to afterwards by Bayley, J., in *Sanderson v. Bowes*, 14 East. 501, that Judge decided that the presentment of a note at the place of payment, mentioned only in a memorandum annexed to it, did not require to be proved in an action against the maker. In *Price v. Mitchell*, 4 Campb. 200, Gibbs, C. J., gave the same decision in the case of a similar memorandum annexed to a note, holding that such a memorandum formed no condition of the contract, though a specification of the place of payment in the body of the note would have done so. A similar decision was given afterwards by the same Judge, in *Richards v. Lord Milsington*, Holt, C. N. P. 374. The same principle was also implied in *Exon v. Russell*, 4 M. and S. 405, *Hardy v. Woodroffe*, 2 Stark. 319, and *Williams v. Waring*, 10 B. and Cr. 2.

¹ This doctrine was held, and corresponding decisions given by the Court of King's Bench, in *Fenton v. Goundry*, 2 Camp. 656-7, 13 East. 459, where reference was made to a similar opinion said to have been expressed by Lord Mansfield in *Smith v. Lafontaine*; in *Lyon v. Sundius* and another, 1 Campb. 423, where Lord Ellenborough held that such an acceptance was a mere memorandum; and in *Rowe v. Williams*, Holt, 366, where the Court, proceeding on the authority of the previous cases, would not hear an argument

that, although the holder of a bill drawn in general terms might refuse an acceptance not conformable to it, yet if he took a restricted acceptance, he was bound by it; that the acceptance fixed the acceptor's contract, as much as the words of a note did the engagement of the granter, and that the words accepted "payable at" a certain place, could have no other meaning than that the bill was to be payable *only* if presented there. It is further said to be the invariable practice to present bills thus accepted at the place where they are made payable¹. These conflicting opinions were at last brought to issue in the House of Lords², in a case where their Lordships, after hearing the opinions of the Judges on certain questions propounded to them, decided, that, in the

on the point. Lord Ellenborough, in this case, added, that the strongest plea with him was the usage of merchants, who did not consider this as a restrictive acceptance, obliging the holder to present at the place specified, but merely as a convenient arrangement. In *Sebag v. Abithol*, 4 M. and S. 466, though the case was decided on other grounds, the Court of King's Bench again laid down the same doctrine regarding the effect of such an acceptance, and Lord Ellenborough considered it as an important circumstance, that, according to an opposite construction, it would be merely a conditional acceptance, and that the previous parties to the bill, if they gave their sanction to it, would thus be burdened with the proof of an additional fact, viz. the presentment of the bill at the place specified. Gibbs, C. J. of the Common Pleas, held the same opinion in *Head v. Sewell*, Holt, 363, where he laid it down, in the case of a similar acceptance, "that the acceptor was generally and universally "liable."

¹ Chitty, 397. The doctrines stated in the text were held by the Court of Common Pleas in *Callaghan v. Aylett*, 2 Campb. 549; 3 Taunt. 397, which was decided before the case of *Fenton v. Goundry* in the Court of King's Bench; and in *Gammon v. Schmoll*, 5 Taunt. 344, 1 Marsh. 80. Reference was made in the first of these cases (in pleading) to *Parker v. Gordon*, 7 East. 385-7, where, in a question between the holder and the drawer of a bill which had been accepted payable at a certain banking-house, the Court of King's Bench held that recourse was lost, because the bill had not been presented at the banking-house in proper banking hours. But this case appears to be solved by the distinction already stated between the holder's obligation to present to the acceptor, if *he can be found*, to the effect of preserving his recourse against the other parties; and the acceptor's obligation, which rests on different principles, to pay the holder, whether such presentment be made or not. Besides, Lord Ellenborough appears to have held, in that case, that if a presentment to the acceptor personally had been proved, it would have been sufficient.

It has been already stated, 425, note 1, that Gibbs, G. J., entertained a different opinion on the point in question from the other Judges of the Court of Common Pleas.

² In *Rowe v. Young*, 2 Brod. and Bingh. 165.

case of a bill accepted "payable at a certain place," without any other words, the holder must present the bill for payment at the place specified, before he can have an action even against the acceptor, and that such presentment, being a condition of the acceptance, must be specially averred and proved. This last point referred to a question of pleading, on which a majority of the Judges had expressed an opinion, that such presentment need not be averred in the declaration, or proved, but that the defendant, besides tendering the money in Court, must prove that he had it at the place of payment, though the holder was not there to receive it, and that then his case would resolve into a claim of damages.

Soon after this decision, the law was placed on a different footing by the 1 and 2 Geo. IV. c. 78, which, after narrating the point decided in the preceding case, and stating, that, in consequence of a general understanding among merchants that such an acceptance is a general acceptance, inconvenience may be sustained if it should on the contrary be regarded, agreeably to this decision, as a qualified acceptance, therefore enacts, that from 1st August 1821, "if any person shall accept a bill of exchange, payable at the house of a banker or other place, without farther expression in his acceptance, such acceptance shall be deemed and taken to be, to all intents and purposes, a general acceptance of such bill; but if the acceptor shall in his acceptance express that he accepts the bill, payable at a banker's house or other place only, and not otherwise or elsewhere, such acceptance shall be deemed and taken to be, to all intents and purposes, a qualified acceptance of such bill; and the acceptor shall not be liable to pay the said bill, except in default of payment, when such payment shall have been first duly demanded at such banker's house or other place." This act, though it refers to a decision in an English case, appears, from the generality of its terms, to be applicable to Scotland; and it must therefore be now considered as the rule in all cases regarding the form and effect of acceptances payable at a particular place, in so far as regards the acceptor's liability.

It has been decided since the date of this statute¹, that bills

¹ *Per* Abbott, C. J., in *Turner v. Hayden*, 1 R. and M. 215; affirmed by the whole Court of K. B.; 4 B. and Cr. 1; 6 D. and R. 5.

accepted, payable at a certain banking-house, are available against the acceptor, though not presented there at the term of payment, and though the bankers had funds more than sufficient to pay them till their failure, which did not occur for some time after the date of payment. Farther, it has been held ¹, that the statute applies where the place of payment is inserted by the drawer, as well as when it is mentioned in the acceptance.

It has been already explained, that the statute does not change the rule as to the presentment required, in order to preserve recourse against the drawer and indorsers ². *1st*, It proceeds on a narrative only of a decision regarding the acceptor's liability under the acceptance referred to; and, therefore, the enacting words may be held to relate to that subject alone. *2dly*, It has been shewn ³, that the acceptance in question may be a general acceptance, such as is described in the statute, and yet that the holder may still be bound to present at the place specified, with a view to his recourse against the drawer or indorsers. An eminent writer on the law of bills ⁴ seems to be of this opinion, as he refers to the statute, only as affecting the claim against the acceptor ⁵. This view has been confirmed by a judgment of the Exchequer Chamber, on a writ of error, arising out of a bill of exceptions, in the case of a bill drawn payable in London, and accepted payable at Messrs J. and Co.'s, bankers, London, in which it was held, *1st*, That, in all cases of a special acceptance by the drawer, there must be a special presentment, in order to charge the drawer, and that the 1 and 2 G. IV. c. 78, applies only to the case of an acceptor; and, *2dly*, That, while the drawer drew the bill, payable "in London," the acceptance did not alter the obligation, so far as he was concerned, but made it more specific ⁶.

It has been decided in England, that, although a bill should be so accepted, that it is necessary to present it at a particular place, even in order to charge the acceptor, he cannot be

¹ Selby v. Eden, and Fayle v. Bird, *ante*, 420, note 5.

² *Antea*, 422-3.

³ *Ibid*.

⁴ Bayley, 222-3.

⁵ *Ibid*.

⁶ Gibb v. Mather, 2 Cr. and Jerv. 254; 8 Bingh. 214; 2 Tyrwh. 189; 6 M. and Pay. 387, S. C.

released on the ground that it is not so presented at the term of payment, if he does not aver that the contents of the bill were thereby lost, though, if he did, the result would probably be different ¹. But, in the case of a foreign bill, if the value of the money in which it is payable has been altered after the date of payment, the acceptor will only be liable according to its value at that time ². This rule relates to bills payable at a fixed term. With regard to bills or notes payable within a certain time after demand, it has been decided, that a demand is necessary to fix the term of payment, and that giving a note to a servant, without presenting it to the debtor personally, is not sufficient ³.

It has been held, that a person bound for the acceptor of a bill by a separate guarantee, cannot be released for want of due presentment of the bill, if the acceptor has become bankrupt before it was due, so that the guarantee has not suffered loss ⁴. But the result will be different if the acceptors, or other parties from whom payment might have been exacted, did not become bankrupt for some time after the term of payment ⁵.

Bills or notes should be presented for payment either by the holder, or by an agent empowered for him to give a legal discharge ⁶.

It is not necessary to present a bill for payment to the

¹ *Rhodes v. Gent*, 5 Barnew. and Ald. 244.

² *Pothier*, No. 174.

³ *The Duke of Norfolk v. Howard*, 2 Show. 235.

⁴ This was the ground of decision in *Warrington v. Furber*, 8 East. 242, where it was found that guarantees for the acceptor of a bill were, under these circumstances, still bound to pay, and, having paid, were entitled to recover from their principals. The same doctrine was also employed in *Phillips v. Astling*, 2 Taunt. 206, although the actual circumstances of the case were different, and led to a different decision. A contrary decision was given by the Court of Session in *Alexander v. Scott*, 28th Nov. 1827, 6 Shaw and D. 151, F. C., in a case where there was not evidence of the bills having been protested. But *vide* the final opinions of the Lord Justice-Clerk and Lord Glenlee in that case.

⁵ *Phillips v. Astling*, note 4.

⁶ This doctrine is implied in *Coote v. Callaway*, 1 Esp. 115, though the case related not to a bill, but to the validity of a demand made for the price of goods, Lord Kenyon having held that such a demand by an attorney's clerk, who said that he made it by his master's authority, was not a valid demand by the plaintiff, and that therefore the defendant was entitled to refuse it.

drawer before suing the indorser for recourse. Presentment to the drawee is in all cases sufficient ¹.

2. Time of presentment.

The time when a bill or note should be presented for payment has been already discussed in considering the time of payment ², and that both where days of grace are, and where they are not allowed ³. Presentment for payment in the former of these cases, before the last day of grace, is a nullity ⁴. This is settled in England. In Scotland, the Court decided ⁵, that a protest for non-payment made on the day of payment was irregular, while they were of opinion that it would have been good, if taken after the day of payment, though before expiration of the days of grace. This opinion, however, seems contrary to principle, since it does not appear competent to protest for non-payment till the debtor is bound to make payment, which is not till the last day of grace ⁶. No such protest has been ever sustained; and, if the case were now to occur, it would be rejected as it has been in England. In case of refusal, a bill may be held dishonoured, and notice of dishonour given early in the day on which the bill is due ⁷. Presentment after expiration of the days of grace, though only the day after, has been decided to be irregular, and the holder has been therefore found, in such cases, to have lost his recourse against the previous parties ⁸. It has been also

¹ The contrary was once held in *Pardo v. Fuller*, Comyn's R. 579. But the doctrine as stated in the text was settled in *Heylin v. Adamson*, Burr. 669. In *Hamilton v. Mackrell*, Rep. Temp. Hardw. 332, and *Moore v. Paine*, id. 286, it was found, that, even in the case of a promissory-note, the holder did not require to prove a demand on the drawer or maker in order to charge the indorser. But this doctrine is erroneous; because the maker of a note is equivalent to the acceptor of a bill, and the first indorser is properly the drawer. Presentment to the maker of the note is therefore undoubtedly necessary.

² *Antea*, 376, *et seq.*

³ *Ibid.*

⁴ *Wiffen v. Roberts*, 1 Esp. 261-2, *per* Lord Kenyon, C. J.

⁵ *Charles v. Skirving*, 2d July 1788, Morr. 1614.

⁶ *Vide Forbes*, 91-2.

⁷ *Clowes v. ———*, 2 Dans. and Lloyd, 212.

⁸ This was first decided in *Ramsay v. Hogg*, 6th July 1743, Morr. 1565; *Elchies*, No. 31, *v. Bill*, where the holder of a bill was found to have lost his recourse, by not protesting it either for non-acceptance or non-payment till the day after expiration of the days of grace. According to *Kilkerran*, the Court appear to have held, in this case, that bills must be protested for non-acceptance on or before the day of payment. But this opinion was corrected by the decision in

decided¹, that, although a party should get a bill so near the term of payment, and at such a distance from the place of payment, that it cannot, by any diligence, be presented in time, he is not therefore entitled to consider it as a bill payable at sight or on demand, (when it would be sufficient not to suffer undue delay,) but must use the utmost possible dispatch. It will not even excuse his delay, that the bankers to whom he has sent it for presentment present it sooner than they were bound to do, although less time should thus elapse on the whole than if each party had taken precisely the time to which he was entitled². He cannot derive benefit, in such a case, from the extraordinary diligence of other parties.

The presentment of bills or notes, payable on demand, for payment, is regulated generally by the rule already stated regarding the presentment of bills or notes payable at or after sight for acceptance, viz. that it must be made within a reasonable time after the holder receives it, and without undue de-

Jameson v. Gillespie, already cited, *antea*, 409, note 2, *Elchies*, No. 44, *v. Bill*, where it was found sufficient to protest, even for non-acceptance, at any time within the days of grace. In the next case, *Cruickshanks v. Mitchell*, 17-29th June 1749, *Morr.* 1576, *Elchies*, No. 49, *v. Bill*, the Court decided, after full deliberation, and an inquiry into the practice of England, that a payee who had not protested his bill for non-payment till the day after expiration of the days of grace, thereby lost his recourse against the drawer. The same doctrine was afterwards held, in *Hart v. Glassford*, 21st June 1755, *Morr.* 1580, with regard to a bill not presented for acceptance till after the expiration of the days of grace; and the application of the rule to this case has never been disputed, except on the ground of the bill being an accommodation-bill. In a later case, *Tod v. Maxwell*, 12th July 1758, *Morr.* 1583, the holder of a bill was found to have lost his recourse against the drawer, by not protesting the bill for non-payment till the day after expiration of the days of grace. In *Fairholms v. The Sun Fire-Office*, 23d June 1761, *Morr.* 1588, though the decision is perhaps doubtful, on other grounds to be afterwards stated, the Court recognised the principle, that a protest for non-payment was ineffectual when made beyond the days of grace. The same doctrine was confirmed more recently in the *British Linen Company v. Hepburn and Co.* 19th May 1807, 1 *Bell*, 411, note 6, where a notary's clerk having presented a bill in due time, but the notary, who thought that he could not extend a protest except on a presentment made by himself, having presented it again after the days of grace, the protest, which proceeded on this presentment, was held to be null. The authority of an old case, *Johnston v. Murray*, 1st Feb. 1715, *Morr.* 1556, in which there was held to be no want of negotiation, although the bill was not protested till the fourth day after the day of payment, cannot now be regarded after this train of precedents.

¹ *Anderton v. Beck*, 16 *East*. 248.

² Note 1.

lay. This rule is applicable, 1st, When the bill or note is payable in the same place where the holder has received it; and, 2dly, When it must be transmitted for payment to a different place.

1. As to the first of these cases, it appears to be now settled in England, on principles also applicable in Scotland, that a person receiving a bill, note, or banker's check payable on demand, in the place where it is to be presented, for instance in London, has the whole day after receiving it for presentment, or, if it is payable at a banking-house, the whole banking hours of the next day. There was once a great fluctuation of opinions on this subject. For example, it has been held no undue delay to keep a check or bill, without presenting it, three, or even four or five days¹, while, on the other hand, the delay of two days² has been accounted too long, or even a delay till next day³, and in one case⁴, for an hour. From these variations in the opinions of juries, the expediency of leaving the time of presentment to them has been much doubted; and it has been laid down that this is a question of law to be decided by the Court, leaving it to the jury to find the facts from which the legal inference is to be drawn, and also consulting them in questions of mercantile usage or expediency⁵. This matter, however, does not appear to be settled⁶; and, perhaps,

¹ *Vide Phillips v. Phillips*, 2 Freem. 247; *Crawley v. Crowther*, id. 257.

² So held by the jury in *Manwaring v. Harrison*, 1 Str. 508.

³ So held by the jury twice, (against the direction of the Court,) in *Appleton v. Sweetapple*, Bayley, 239, where a bill payable on demand, which the plaintiff had got about one p. m., was not presented for payment till next morning. The case is also reported, 3 Dougl. 137, with a small variation of circumstances, but not such as to affect the point at issue. The same thing was found in *Hankey v. Trotman*, 1 Blackst. 1, with regard to a check on a banker which a plaintiff had got about noon, and, though he got it marked for acceptance that night, waited for payment till next morning, when the banker had failed. The same result also followed, against the opinion of the Court, in *Medcalf v. Hall*, 3 Dougl. 113.

⁴ Lord Mansfield, in *Tindal v. Brown*, 1 T. R. 168-9, states, that, in a previous case, *Metcalf v. Douglas*, the jury "struggled so hard, in spite of the opinion of the Court, to narrow the rule, that they held you must, in certain cases, demand payment of a banker's draft within an hour."

In an early case, *Mead v. Caswell*, 9 Mod. R. 60, a rule similar to the more recent doctrine was adopted; it being held that the indorser of a note, who had given it in payment of a debt, was not released by the circumstance of the holder's servant not presenting it till Monday morning, though he had got it on Saturday.

⁵ *Chitty*, 412.

⁶ *Bayley*, 234-6.

the only conclusion to be attained respecting it, is that which has been already stated as to the proper time of presentment for acceptance¹. At all events, the doctrine now adopted seems to be, that the holder of such a bill or note is not bound to present it instantly to the neglect of all his other business, but must do so as soon as is possible, consistently with the ordinary course of business. It has been said for instance, that "it was unreasonable to suppose that a tradesman should be compelled to run about the town with half a dozen drafts from Charing-Cross to Lombard Street, and other places, on the same day." On this principle, Lord Mansfield, in the case alluded to, directed the jury to allow twenty-four hours for presenting a check on a banker; and, though they thought otherwise, and found for the defendant, the Court granted a new trial². In other cases it has been held, that a person receiving a bill or note is allowed till next morning to present it for payment³. But more recently, it has been decided, that such a bill or note, made payable at a banker's, may be legally presented for payment at any time within bank-

¹ *Antea*, 414.

² Per Lord Mansfield, C. J., in *Tindal v. Brown*, for whose opinion *vide* Beawes, No. 229, as corrected by Kyd, p. 45; and also in *Medcalf v. Hall*, 3 Douglas, 113, where a similar opinion of his Lordship, though negated by the verdicts of two juries, was sanctioned by the rest of the Court.

³ In *Ward v. Evans*, 2 Lord Raym. 928, it was held sufficient negotiation of a note to demand payment the morning after receiving it, though the debtors remained solvent all the previous day, and had stopped when it was presented. A similar rule was held under nearly similar circumstances, in *Moore v. Warren*, and *Holme v. Barry*, 1 Str. 415; *Turner v. Mead*, id. 416; and *Fletcher v. Sandys*, 2 Str. 1248. In *East India Company v. Chitty*, 2 Str. 1175, where a goldsmith's note, which the plaintiff had got at half-past eleven A. M., was not presented till next day after two P. M., at which hour the goldsmith stopped payment, it was held that it ought to have been presented in the afternoon of the first day, or, at all events, in the morning of the second day, and therefore the defendants had a verdict. A similar verdict was given, and was affirmed by the Court, in *Hankey v. Trotman*, 1 H. Bl. 1, where a banker, having taken a draft on another banker in payment of a bill, did not ask payment that night, but only got it marked for acceptance, and the banker had stopped before next morning. In *Hoare v. Da Costa*, 2 Str. 910, where the plaintiff, having got a note at twelve, carried it to the debtor with other notes at ten next morning, and left them, as usual, to call for payment at eleven, when it was asked, as well as afterwards at two, but refused, (the bankers having paid small notes for two hours after two o'clock, and stopped altogether at four,) the jury held that there was no laches, and found for the plaintiff.

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ing hours of the day after it was received ¹. The same decision has been given recently with regard to the presentment of a banker's check ², and it has been held, that any rule which may exist between bankers as to presenting checks for payment at the clearing house the day on which they are received, does not alter the rule, that the holder of a check has, in a question with the granter, a day after he receives it to present it for payment. It has been also held, that a London banker receiving a check from his correspondent in the country to be presented for payment, is not bound so to present it till the day after he receives it. This decision was given on general grounds, without reference to local usage ³.

It is said, that when a person who makes his livelihood by dealing in bills or notes payable on demand, gives such bills or notes as cash, there can be no fixed rule to determine what delay in presenting them for payment shall be accounted un-

¹ In *Robson v. Bennet*, 2 Taunt. 388, which was the case of a banker's check, it was taken for granted that the check might be presented for payment at any time of the day after receiving it; and, accordingly, it was held to be duly negotiated, when the plaintiffs' bankers, whom the plaintiffs employed to get payment, on presenting it the first day, took an acceptance payable the next day at the clearing house, and afterwards waited for payment the whole of next day at the clearing house before giving notice. Presentment for payment at the clearing house, which the acceptance pointed out as the place of payment, was held to be the same with presentment at the bank; and the whole proceedings were proved to be conformable to the usage of London bankers in their dealings with each other. In *Pecklington v. Silvester*, Chitty, 419, which was also the case of a banker's check, the plaintiff having got the check at eleven in the morning of 16th November, but not having presented it till five p. m. of the 17th, while the bankers had stopped at four p. m., the jury, at first, contrary to the direction of Gibbs, C. J., found for the defendant, but a second jury found for the plaintiff, Burrough, J., having directed them that it was now a fixed rule to allow the whole of the second day to present for payment.

² *Boddington v. Schlenker*, 3 Nev. and Man. 540.

³ *Rickford v. Ridge*, 2 Campb. 530, *per* Lord Ellenborough. The same doctrine was held in *Williams v. Smith*, 2 B. and A. 496, where certain bank notes having been sent from the country, by a person who received them, to his London correspondent to get payment, the latter was found to have negotiated them properly by presenting them the day after they arrived, although payment was then refused, on account of the intervening accounts of the granter's failure, but would have been made, if the notes had been presented the day of their arrival. In *James v. Holditch*, 8 D. and Ry. 40, where a servant received country bank notes for his master on Friday, and paid them to him on settling accounts after bank hours on Saturday evening, and they were not presented till Monday morning, while the bank had stopped on the Saturday, recourse was allowed against the giver of the notes.

reasonable¹. It must be decided, from the circumstances of the case, whether his chief object was to put them into circulation, as with ordinary bankers' notes, in which case there seems to be no definite time for presenting them, or whether they are mere drafts or bills on third parties, issued for the purpose of paying a single debt. When bankers receive bills or notes payable on demand, they must observe the rules of presentment, which have been already mentioned, like other parties². In a Scotch case, where a promissory-note, payable on demand, was held to be granted as a loan, and not as a remittance, it was found to have been duly negotiated, though not presented or protested for more than five months after its date³.

2. When a bill or note payable on demand is received in a different place from that in which it is payable, it must be transmitted to the latter place for payment without undue delay. It is said⁴ to have been held, at one time, that such a bill or note must be sent by the first post after it was received, although the post should go out the same day. But it has been decided in the latest cases, that it is sufficient to send it the day after receiving it⁵. If it should not be safe, however, to send the notes entire by one post; for instance, in the case of notes payable to the bearer, of which it becomes necessary to send halves by a conveyance which does not arrive till after the second day's post, the transmission of the remaining halves may be made by the second day's post, since

¹ Bayley, 236.

² Bayley, 236, &c. This appears to be the true scope of the rule laid down by this author, although it is somewhat differently expressed.

³ *Leith Banking Co. v. Walker's Trustees*, 22d Jan. 1836, 14 S. D. B. 332, F. C.

⁴ Bayley, 237-8.

⁵ This was held in *Rickford v. Ridge*, 2 Campb. 539, where the plaintiffs having received a check on a London bank at mid-day, on 13th June, did not send it till the next morning, by a coach which set off at 8 A. M., although the post set off at 6 P. M. on the day that they received it. In *Williams v. Smith*, already cited, *ante*, 434, note 2, it was held, that sufficient dispatch had been used by sending off the notes in question, (which had been received on Friday,) after cutting them into halves, one-half in a packet by a coach, which set off on Saturday evening, and another by Sunday's post, although the packet did not reach London till Monday, some time after the Sunday's post; it being held, that as the notes were payable to the bearer, such a transmission of them in halves was necessary, as a precaution.

their earlier arrival would be of no advantage ¹. It has been decided, that a party who had taken notes of a bank on 10th December, as payment of a debt, the bank having stopped payment that morning, though neither he nor his debtor knew it, and who neither circulated nor presented them for payment, but, on 17th December, offered them back to his debtor, had failed to negotiate them properly, and lost his recourse for the debt ².

Such notes may be transmitted by other safe conveyances, besides the post, although, unless in case of necessity, the remitter must take the risk of those conveyances arriving later than the post, which is the only accredited conveyance. The holder will lose his recourse by delaying to transmit his bill or note till the second day after receiving it, although he should then send it by a conveyance which arrives only an hour later than the post of the preceding day ³. Courts of law will not suffer the holder to escape from his own neglect by inquiry into such minute circumstances.

It would seem, that, though a banker's check payable on demand may be kept in circulation for some time, according to mercantile usage, and, in that case, will not require to be presented till within a reasonable time after the last holder receives it, such circulation cannot be kept up for an unlimited time, so as to render all the previous parties liable, on the drawee's failure, at whatever time the check may be presented ⁴. It must be determined, from the circumstances of the case, what extent of circulation is allowable.

As to the time of day when a bill, note or check, must be presented for payment, the rule is the same as in presentment for acceptance, that it must be made at a seasonable hour. It has been laid down, that if, by the known custom of the

¹ *Williams v. Smith*, note 4.

² *Camidge v. Allenby*, 6 B. and Cr. 373.

³ *Beeching v. Gower*, Holt, 315, per Gibbs, C. J., who held, that the plaintiffs were perhaps bound to have sent off the document in question, (a banker's check,) by the post of the 5th, on which day they received it, but, at all events, by that of the 6th. The first of these alternatives is contrary to the doctrine now established by *Williams v. Smith*, *antea*, 434, note 2.

⁴ This doctrine is taken for granted in *Boehm v. Stirling*, 7 T. R. 430, where it is laid down, that the rule regarding the necessity of presenting, within a reasonable time, bills or notes payable on demand, is also applicable to bankers' checks.

place where a bill or note is payable, such documents can only be presented there within certain hours, presentment beyond those hours will be deemed unseasonable¹. When the bill or note is to be presented to a person in any particular business, for instance, to a banker, presentment will not be good, beyond the hours usual for such persons; it being held, that the creditor, by engaging to present to such a person, binds himself to present during the hours so fixed². But presentment to a banker or any other person cannot be considered unseasonable, at whatever hour, if a person is stationed at the bank or other place of presentment, who gives an answer refusing to pay³. In a case, however⁴, where a bill was presented for payment at a bank in the morning, and refused for want of effects, and afterwards presented at six o'clock in the evening, (effects being lodged in the meantime,) and again refused, the bankers not being obliged to pay after five o'clock, it was decided that they were not liable in damages to the drawer, their customer, for the refusal. They had paid the bill, as well as the expense of noting, next day. If the drawee or debtor is not a banker, but a private trader, a presentment at his house, even late in the evening, for in-

¹ Bayley, 224.

² This rule was laid down in *Parker v. Gordon*, 7 East. 385. In *Elford v. Teed*, 1 M. and S. 28, being an action against the drawer by the indorsee of a bill, payable at a banking house, which had been presented there between half-past six and seven P. M. by a clerk, who found the bank shut, and who, on going to a private door, was answered by a female servant, "no orders," Lord Ellenborough first, and afterwards the whole Court, laid down the same rule as in *Parker v. Gordon*, which they held to be a precedent for this case. But, as the plaintiff alleged another presentment *during* banking hours, he was allowed a new trial to prove it, on payment of previous expenses.

³ In *Garnett v. Woodcock*, 1 Stark. 475, 6 M. and S. 44, a bill which was accepted, payable at a certain banking house, having been presented there betwixt 7 and 8 P. M., when a boy answered, "no orders," Lord Ellenborough held, that as an answer had been given by a person who must be presumed to have been stationed there for the purpose, the presentment was good, though it had been made at midnight. The same doctrine was laid down by his Lordship, and by Bayley, J., in *Henry v. Lee*, 2 Chitty's Rep. 125. The distinction between the case first mentioned, and *Elford v. Teed*, note 1, appears to be, that in the latter case, the bank *was shut*, and no answer was made except by a female servant who opened the *private door*, and who could not, therefore, be presumed to have been stationed there to give an answer.

⁴ *Whitaker v. Bank of England*, 5 Tyrwh. 268.

stance at 8 P. M., will be sufficient, although it will not be valid if made during the usual hours of rest¹.

When a bill is presented at the place mentioned in it as the acceptor's residence, but the house is found shut, and he cannot be heard of in the neighbourhood, the bill has been held to be dishonoured².

A bill or note, when presented for payment, cannot be left in the debtor's hands as when presented for acceptance; and, if it is so left, presentment cannot be considered as made till payment is demanded³. It seems to have been held, in two early cases⁴, that leaving notes with the debtor in the morning was sufficient presentment, though payment was not called for till the evening, when they had failed. But these decisions were founded on local custom, and do not interfere with the general rule.

If bankers at whose house a bill is payable at first refuse it, when presented for payment, for want of effects, but afterwards, on getting a remittance, send to take it up, when they

¹ *Barclay v. Bailey*, 2 Campb. 527, *per* Lord Ellenborough, who sustained a presentment made under the circumstances stated in the text, at 8 P. M., although the drawee had a person stationed at his residence from 9 A. M. to 4 P. M. of that day, who would have paid the bill then, if it had been presented. A similar decision was given in *Triggs v. Newsham*, 1 C. and Pay. 631, 10 Moore, 249, and in *Wilkins v. Jadis*, 3 M. and Malk. 41, 2 B. and Ad. 188, where a bill was presented at the place of payment mentioned in the acceptance between 7 and 8 P. M., but the door was shut, and though the presenter called, no one answered. In *Morgan v. Davison*, 1 Stark. 114, where the bill in question being made payable in London, at the house of a company who were not bankers, had been presented at their counting-house between 6 and 7 P. M., when there was only a girl to take care of it, Lord Ellenborough held the presentment to be good, as this was an hour when the plaintiff might expect to find the party in his counting-house. The plaintiff, who was suing the drawer for recourse, had a verdict.

² *Hine v. Allely*, 1 Nev. and Mann, 433. Reference was made here on a similar point, to *Hardy v. Woodroffe*, 2 Stark. 319, and *Burbidge v. Manners*, 2 Camp. 193.

³ In *Hayward v. Bank of England*, 1 Str. 550, where the plaintiff had paid in to the defendants a banker's note, which their runner left with the banker in the morning, when the banker cancelled it, but did not ask payment till the afternoon, by which time the banker had stopped payment, it was held that the defendants were liable to the plaintiffs for the value of the note in the morning, which was accordingly rated at half its amount, as the banker paid 10s. *per pound*. The defendant's clerk had taken a new note for the amount from the banker in the afternoon, but this was held to be irregular.

⁴ *Turner v. Mead*, 1 Str. 416; *Hoar v. Da Costa*, 2 Str. 910.

learn that the holders have sent it back, and, in the meantime, the same bankers receive new orders from their correspondents not to pay it, it has been found, that they are entitled, on this ground, to refuse payment, as the holders of the bill did not desire them, when offered payment, to keep the money for their use, but virtually relinquished their claim over it¹. But a marking by bankers on a bill, importing that it shall be paid next day at the clearing house, is absolutely binding on them². If an agent, who has got money to pay a bill, offers the amount on getting it up, which, however, is then impossible, as it is mislaid, and, in the meantime, the agent fails with the money in his hands, the principal will still be liable for the debt, because there has been nothing but a tender of payment, which does not extinguish it³. If the principal wished to be secure, he should have ordered consignment.

It will be no excuse for want of due presentment, whether for acceptance or payment, that the drawee or maker is dead⁴, or has been put in prison⁵, or has failed before the term of payment. The bill or note must, even in these cases, be strictly negotiated; and it would be inconsistent with the security of bill transactions to disturb this rule, while it would open a wide source of litigation, to allow an inquiry in each case, whether, through the drawee's insolvency or otherwise, the previous parties have not suffered loss from want of due negotiation. The doctrine now stated has been accordingly long settled both in Scotland and England⁶.

¹ *Stewart v. Fry*, Holt, 372, *per* Gibbs, C. J., 1 Moore, 74.

² *Robson v. Bennett*, 2 Taunt. 388.

³ *Dent v. Dunn*, 3 Campb. 396, *per* Lord Ellenborough.

⁴ Pothier, No. 246.

⁵ *Per* Lord Alvanley in *Haynes v. Birks*, 3 Bos. and Pull. 599, who, in considering a question of notice, said that he would throw altogether out of view the circumstance of the holder being informed, when the bill was presented last for payment, that the acceptor was in prison.

⁶ In *Langley v. Hogg*, 17th June 1748, Morr. 1574, the Court sustained an objection to recourse against the indorser of a bill, founded on the circumstance of its not being protested till the second day after expiration of the days of grace, although it was pleaded that the acceptor had been gazetted as a bankrupt more than eight days before the term of payment, and that the indorser knew of his bankruptcy so well, that he desired his correspondent to take up the bill for his honour. In *Finlason v. Ewcn*, 2d Feb. 1773, Morr. 1597, the onerous

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When a bill was presented the day before it became due to the drawees, who said that they had then no effects of the drawer, but that he would probably provide them before next

indorsee of a bill was found to have lost his recourse against the payee and indorser by not protesting in time, and by failure in other points of negotiation, though it was said that the drawer had no effects in the drawee's hands, (which was held not to be pleadable against the payee, as *his* claim of recourse could not be affected by it,) and although the drawee had failed before the term of payment. The Court appears to have afterwards deviated from this last ground of decision, in *M'Alpin and Company's Creditors v. Parson and Govatt*, 21st Jan. 1792, Morr. 1617, where the circumstance of the acceptor becoming bankrupt before the term of payment is stated, *inter alia*, to have been a reason for repelling an objection to the holder's recourse against the drawer, which was founded on the fact of their not being a timeous protest; and also in *Harrisons v. Chippendale*, 9th Dec. 1794, Morr. 1620, where an objection to recourse was repelled partly on the same ground. In this last case, claims had been lodged on the acceptor's bankrupt estate before the term of payment. But, in *Batchins v. Orr*, June 1792, Morr. 1619, the Court refused to inquire whether the granters of a note must have been bankrupt before notice could, in any event, have reached the indorsers. A different opinion was again held by some of the Court in *Henderson v. Duthie*, 19th Jan. 1799, Morr. App. v. Bill, 9. But they returned to the former doctrine in *Ferguson and Co. v. Belsh*, 17th June 1803, Morr. App. v. Bill, 16, where they held, that recourse by the indorsee of a bill against his indorser was cut off by want of negotiation, although the acceptor had failed before the bill became due. Again, in *Calder v. Lyall and others*, 22d Dec. 1808, F. C., it was found to be no answer to the plea of undue negotiation, (arising, in this case, from want of notice of dishonour, which, however, with reference to the point now in question, depends on the same principle with want of presentment,) that the acceptor had failed before the bill became due. The Court held, that bankruptcy was not a fact with which the drawer or indorser were supposed, *præsumptione juris et de jure*, to be acquainted; that the question as to their private knowledge of it would open up an endless source of litigation, and that, therefore, the general rule, with no exception but in the case of wind bills, was to require strict negotiation in all cases. They also held, that no inquiry was competent into the amount of damage sustained through the want of it. In *Thomson, Stott and Co. v. M'Ruer*, 20th Jan. 1800, referred to in a note to the preceding case, where the acceptor's bankruptcy before the term of payment was likewise alleged, the same opinion was expressed, though there was no room for deciding the point, as the holder's allegations on this subject turned out to be unfounded.

The point has been also quite settled in England. In *Russell v. Langstaff*, 2 Dougl. 514, it was stated, that Lord Mansfield had often ruled, that the acceptor's bankruptcy did not excuse want of notice, (which depends on the same principles on this point with want of presentment); and Lord Mansfield, who was in Court, did not dispute the statement. The same principle was recognised in *Bickerdike v. Bolman*, 1 T. R. 408; and also in *Warrington v. Furber*, 8 East. 242, although it was held there not to be applicable, as the question did not relate to the negotiation necessary to preserve recourse against a party to a bill, but to the means for preserving recourse against a person bound by a sepa-

day, when it fell due, it was held that it should have been presented on that day; and it was found to be no excuse for non-presentment, in an action against the drawer, that he had, on that day, expressed a hope to the holder that the bill would be paid, and said that he would endeavour to provide effects, and see him again. The bill, not having been presented again till the day after it became due, the plaintiff was non-suited in an action against the drawer ¹.

rate guarantee. On this alleged exception, however, to its application, *vide* in Scotland, *Alexander v. Scott*, 28th Nov. 1827, 6 S. and D. 151, F. C. The objection of the acceptor's bankruptcy was also held to be no answer to the plea of want of presentment and notice, in *Nicholson v. Gouthit*, 2 H. Bl. 612, or to the plea of want of notice in *Whitfield v. Savage*, 2 Bos. and Pull. 277, though the bankruptcy was known in both cases to the party claiming notice before the term of payment. A similar objection was disregarded by Lord Ellenborough in *Thackeray v. Blackett*, 3 Campb. 154. In *Eisdale v. Sowerby*, 11 East. 114, Lord Ellenborough says, "It is too late now to contend that the insolvency of the drawer or acceptor dispenses with the necessity of a demand of payment, or of notice of the dishonour." This *dictum* may be held to express the law on the subject, as it is now established both in Scotland and in England. The Lord Chancellor, in *ex parte Wilson*, 11 Ves. 412, and in *Boulton v. Stubbs*, 18 Ves. 21, refers to it as the settled rule.

¹ *Prideaux v. Collier*, 2 Stark. 57. *Vide* on this case, Chitty, p. 300, note 1.

SECTION II.

Of Protest for Non-acceptance, and for Non-payment.

If the drawee of a bill refuses to accept it, when presented to him for acceptance, or the drawee of a bill or maker of a note refuses to pay it when presented for payment, the holder, to preserve his recourse against the other parties, must take what is called a protest, as written evidence of his having made due presentment, and of the debtor's refusal. This is not necessary, to make good the holder's claim against the drawee or maker of a bill or note; for, though a protest is required in Scotland by statute, to warrant summary diligence even against the drawee or maker, this party, being proper debtor, may be sued by an ordinary action without a protest.

The form and manner of taking a protest must be regulated by the law or usage of the country where the bill or note is to be presented for acceptance or payment¹. In Scotland, it must be taken by a notary-public before two witnesses, and is then evidenced by an instrument written out and signed by the notary, which is called an instrument of protest. The form of this instrument, with reference both to non-acceptance and non-payment, is given in the Appendix. In Scotland, as in most other countries, excepting England, where a protest is not absolutely necessary with regard to inland bills, or promissory-notes, it is the sole foundation of recourse against previous parties, and cannot be supplied by witnesses, by the oath of party², or even by a decree for payment against the acceptor or maker; the creditor being held to forego his recourse against the other parties, unless he takes this mode to preserve it³. In case of the bankruptcy of any of these parties, the protest is a necessary article of evidence in support of a claim against their estates⁴.

¹ Pothier, No. 155.

² 1 Stair, 11, 7. In England, the necessity of a protest with regard to foreign bills is laid down in *Rogers v. Stephens*, 2 T. R. 713, though the want of it was excused in that case by other causes; also in *Gale v. Walsh*, 5 T. R. 539, and in other cases, which it is needless to particularise.

³ Pothier, No. 136.

⁴ 1 Bell, 414.

In England, as already mentioned, protests are not necessary to preserve recourse, either on inland bills, or on promissory-notes; these last being placed by statute on the same footing with inland bills. But, by 9 and 10 Will. III, c. 17, a protest is allowed for non-payment on bills above £.5 payable at a certain time after date, which bear to be for value received, and have several other requisites therein expressed; and, by a subsequent statute, it is enacted¹, that, without a protest for non-acceptance, if the drawee should not accept by his subscription on the bill, or, without a protest for non-payment, if he should accept but not pay, the holder shall not have recourse against the drawer, *under that act*, for costs, damages or interest, but only for the principal sum. It has been decided², however, that he is entitled to recover interest without proving a protest, that being a claim which was competent to him at common law. Bills also for any sum under £.20 are excepted from the act. This enactment is not extended *in terminis* to promissory-notes; but it must be held to include them, as it enacts³, that action shall be competent on such notes, “*in like manner* as in cases of inland bills of exchange⁴.” In Scotland, a protest has been always held indispensable, both on foreign and inland bills or notes, to preserve recourse against the drawer or indorsers for any claim competent to the holder. The act 12 Geo. III. c. 72, § 41, enacts, that there shall be no recourse against the drawer or indorsers of inland bills or promissory-notes, unless a protest has been taken on them, as on foreign bills, before expiration of the days of grace⁵.

Certain steps are necessary, before the notary is entitled to extend the instrument of protest. When the drawee or maker refuses acceptance, or payment, as the case may be, the creditor in the bill or note, or, if he be sick or absent, some third

¹ 3 and 4 Ann. c. 9, § 5.

² *Windle v. Andrews*, 2 B. and A. 696.

³ § 1.

⁴ But *vide* on this whole subject, Bayley, 260, *et seq.* As the matter relates purely to English law, and as it is very difficult to reconcile the authorities upon it with the statute, or to decide how far the former should be held to modify the latter, I can scarcely presume to state an opinion regarding it.

⁵ In *Ferguson v. Belah*, 15th June 1803, *Morr. App. v. Bill*, 16, it was observed from the Bench, that our law had never made any difference with regard to the necessity of protests between foreign and inland bills.

party¹, must apply to a notary, who should immediately present it again, and demand acceptance or payment. This is the rule, when the bill is not payable at a different place from the drawee's address, in which case it should be presented by the notary according to his address. But, when it is payable elsewhere, and acceptance has been refused, it is necessary only to protest it, without farther presentment, at the place of payment, unless it be paid to the holder, on the day when it would have become payable, had it been duly accepted². As the drawer and indorsers are liable, in the case here supposed, immediately on non-acceptance, without farther presentment, it is said that the presentment for payment here dispensed with must be merely that which was otherwise necessary to complete the liability of any person who had accepted *supra* protest³.

This notary, being truly a witness, ought not to have an interest in the bill or note ; and therefore⁴ it has been held improper for the managing partner of a bank to act as notary in protesting their bills, though it is said that a mere stockholder whose interest is very remote may do so. The Court has also decided⁵, that a protest is null, taken by a notary on a bill wherein he was acceptor, holding, 1st, That he was excluded, as he alleged that he had signed the bill for the drawer's accommodation, and was, therefore, interested to preserve recourse against him ; and, 2^{dly}, That, in no event, is a protest taken by an acceptor on his own bill valid. They held no reduction of the protest to be necessary, as the nullity appeared *ex facie* of it and of the bill. It has also been decided, that a protest is null, if taken by a notary who is drawer and indorser of the protested bill⁶. But it has been held no objection to a protest on a bill payable at the office of the drawer and

¹ Molloy, 2, 10, 17.

² 2 and 3 W. IV. c. 98. A different rule had been previously laid down,

³ Chitty, *Addenda*, 806.

in *Mitchell v. Baring*, 10 B. and Cr. 4.

⁴ *Farries v. Smith*, 9th June 1813, F. C. There was no express decision in this case, regarding the legality of the protest, as recourse was held to be lost for want of due notice of dishonour.

⁵ *Russell v. Kirk*, 27th Nov. 1827, 6 S. and D. 133.

⁶ *Leith Banking Co. v. Walker's Trustees*, 22d Jan. 1836, 14 S. D. B. 332, F. C.

holder's son, that he, being a notary, had taken the protest¹. This doctrine was confirmed in another case², where it was also decided, that the circumstance of the notary being a partner of the drawers, could not invalidate the protest to an onerous holder of the bill, when not apparent *ex facie* of it ; and farther, that his liability for the company's debts, from not having sufficiently notified his retirement, was not, in any event, enough to disqualify him.

In a case³, where a notary employed by bank agents to protest their bills had committed an error in a protest, which nullified it, the Court held it to be doubtful whether he was liable to the bank agents, they having made a bargain with him by which he drew only one-fourth, while they drew three-fourths of the charges of protesting. But the question was not decided, another point being raised, viz. whether the bank agents were onerous holders of the bill, and could have recovered any debt under it⁴.

Any person having the custody of a bill may get it protested for non-acceptance⁵ ; but it is only the creditor, or some person authorised by him, who can get a protest taken for non-payment, as such a protest would be obviated by the debtor offering to make payment, which supposes that there is a party capable of giving a discharge⁶.

Presentment must be made in presence of two witnesses. It is safest, and seems most conformable to principle, that the notary should himself present the bill or note, although it has been questioned whether it would not be sufficient that his clerk should present it. In one case⁷, of a bill made payable in London, and protestable there, this was held sufficient, on a proof that it was conformable with the universal practice in London. With regard to bills drawn from or made payable in England, it has been laid down⁸, that “ the demand of payment on a foreign bill must be made by a notary-

¹ Reid v. Grindlay, 19th Nov. 1830, 9 S. D. B. 31.

² Mackenzie v. Smith, 23d Nov. 1830, 9 S. D. B. 52.

³ Murray and Son v. Taylor, 15th May 1828, 6 S. and D. 802.

⁴ Ibid.

⁵ Forbes, 89.

⁶ 1 Bell, 415, also *antea*, 429.

⁷ Stevenson v. Stewart and Lean, 14th Nov. 1764, Morr. 1518.

⁸ Per Buller, J., in *Leffley v. Mills*, 4 T. R. 175.

“public,” to whom credit is given because he is a public officer. This rule was also laid down by one of the latest English authors on bills¹; and although it has been questioned, both in London and Liverpool, where it is said to be the practice for notaries’ clerks to make the demand, yet the same author, in his last edition, recommends it as the most prudent course still to cause the notary make the demand². The ground of this rule is, that the instrument of protest, depending on the credit of the notary as a public officer, cannot be effectual when he extends it on the credit of a third party, especially as the protest sets forth, that *he himself* presented the bill or note to the debtor. Reference has been made to one English case³, where presentment by a clerk is said to have been held sufficient; but there was no question there as to the protest, since it was the case of an inland bill, where recourse would have been preserved, though there had been no protest. Even in another case already referred to⁴, the validity of a demand by a notary’s clerk in the case of an inland bill was doubted, though there was no occasion to decide it. It seems, therefore, doubtful, whether the English practice, even in cases where a protest is necessary, is fully established; and, in bills or notes to be protested in Scotland, there appears to be no warrant for such a practice.

In England, an entry by a deceased notary’s clerk, in his master’s book, made in the usual course of business, and bearing that a bill was protested and dishonoured, has been held admissible evidence of presentment⁵.

If the debtor in a bill or note refuse acceptance or payment to the notary, the latter makes a minute at the time on the bill or note, containing his initials, the year, month and day, and the refusal to accept or pay, with the reason of refusal, (though this is not always noted,) and an account of his charges. This is called noting. It was at first only the taking of a memorandum by the notary to assist his memory in extending the protest, and was said to be “unknown to the

¹ Chitty, 216-17.

² Chitty, 493, &c. 8th edition, and correspondence there quoted.

³ *Elford v. Teed*, 1 M. and S. 26; Glen, 197.

⁴ *Leftley v. Mills*, 445, note 6.

⁵ *Poole v. Dicus*, 1 Bingh. N. S. 649.

"law as distinguished from the protest¹." But it seems to be now held, both in Scotland and England, that noting is a kind of initial protest, which will be sufficient in the mean time, if an instrument of protest is regularly extended afterwards. This doctrine is applicable equally to foreign and to inland bills². But, as the fact that the bill was protested rests on the notary's evidence, it does not appear, that, in the case of his death or absence, any other person, though a notary, can give an extended instrument on the authority of his noting³. It will afterwards appear that, by the later decisions, it is not necessary to transmit the protest, or even a copy, with notice

¹ *Per* Buller, J., in *Leftley v. Mills*, 4 T. R. 175.

² In *Brown and Co. v. Hutchison Dunbar*, 8th Dec. 1807, *Morr. App. v. Bill*, 27, where the indorser of a bill suspended a charge given him by the holder, on the ground that the bill had not been regularly protested on the last day of grace, but only noted; and that the holder's letter, intimating the dishonour to the suspender, had said that the bill "not being protested," they had returned it to their bankers, &c. and when they received it back, would present it for payment; the Court held that the noting was sufficient, and that the intimation to the indorser left it to be understood that the bill was noted, and that the protest would be extended afterwards. The bill was both drawn and payable in London. But the Court appears to have proceeded on the general ground, that the practice of noting was admissible in all cases of bills and notes.

In England, in *Chaters v. Bell*, 4 Esp. 48, being an action by the indorsee against the indorser of a bill drawn in Ireland, payable in London, when it was objected that there was not, as there ought to have been, a protest regularly drawn up of the same date with the dishonour of the bill; Lord Kenyon held, "that if the bill was regularly presented and noted at the time, the protest might be made at any future period;" that a protest was necessary before litigation, and must be averred and proved in the action, but that the want of it afforded no ground to the indorser before an action for refusing payment. Lord Ellenborough, on this case coming afterwards before him, expressed the same opinion. In Selwyn's N. P. 360, 5th edit. it is said that, on the second trial, the point now mentioned being considered of great importance, was reserved for the opinion of the Court on a special verdict, but was never argued. In *Goostrey v. Mead*, Bull. 272, although the plaintiff, holder of a bill drawn in the West Indies on London, was non-suited, in an action against the payee and indorser, because he had not sent him the protest for non-acceptance, (the necessity of which shall be considered afterwards,) it was laid down that the bill might be noted on the day of refusal, and that the protest might be drawn out by the notary any day after, and dated as on the day of noting. This opinion was referred to afterwards, in *Orr v. Magennis*, 7 East. 361.

In England, a protest, as already mentioned, is not necessary to preserve recourse on inland bills. But, in so far as it may be necessary to preserve a claim for costs and damages, noting would appear to be sufficient in the first place, in that class of cases, as in foreign bills.

³ *Vide* Chitty, 509.

of the dishonour of the bill or note. But no action of recourse can be maintained against the drawer or indorsers, unless an instrument of protest is regularly extended and produced¹. In Scotland, as will be afterwards seen, there can be no summary diligence on bills or notes, either for non-acceptance or non-payment, unless a protest is registered within six months from the date of the bill in the former case, and, in the latter case, from the term of payment.

The notary's duty, after presenting and noting the bill or note, is, to draw out the instrument of protest, as the legal certificate of his whole proceedings. This instrument is generally extended from the bill, or, if that cannot be obtained, from a copy². If even this cannot be got, as if the bill is lost, the protest ought still to be taken, and will probably be sustained, since no person can be bound to perform an impossible condition³. The protest in that case should state why neither the bill nor a copy of it can be had.

The instrument of protest must be written on paper duly stamped, the stamp-duty being proportioned, according to

¹ This was held both in *Rogers v. Stephens*, 2 T. R. 714, and in *Gale v. Walsh*, 5 T. R. 239, with regard to the necessity of proving a protest for non-acceptance, when the bill had been presented for acceptance, and refused. These were both cases of foreign bills. In the latter case the point was decided, and the same opinion was expressed in the former case, although it was decided on other grounds. The like opinion was also given, in *Orr v. Magennis*, 7 East. 359, *per* Lord Ellenborough.

In Scotland, in *Barbour v. Newall*, 23d May 1823, 2 S. and D. 328, F. C., certain protests being objected to in an action on a bill against the drawer and indorser's "representative," and the pursuer having got other instruments of protest extended, which he produced, the Court held that such instruments might be extended within a proper time from sufficient evidence; but that this could not be done after the original instruments of protest had been recorded and produced in judgment, and farther, that the evidence was not sufficient in this case, and therefore they dismissed the action. In *Alexander v. Scott*, 28th Nov. 1825, 6 S. and D. 150, F. C., instruments of protest, completed after an interval of eight years, from noting made at the time, and long after an action brought against a guarantee on the bills, in order to prove that the bills had been duly negotiated, received full effect.

² *Debers v. Harriot*, 1 Show. 164. In this case, a foreign bill (first and second,) which was payable in Dublin, having been indorsed to a third party, to whom also the first number of the bill was sent, but lost on the way, and, lest the second should likewise miscarry, a copy only of it having been sent to him, on which a protest was taken, the protest, in an action by an indorser, was held to be good, the original of the second bill having been produced at the trial.

³ Pothier, No. 145.

the rates mentioned below¹, to the amount of the bill or note. It has been held², that an instrument of protest including several bills is ineffectual, as being a fraud on the stamp acts, which require a separate instrument for each bill. The principle of 1 Ann. c. 2, sect. 2 and 3, and 12 Ann. sess. 2, c. 9, sect. 21 and 24, already cited³, is applicable to this case.

The bill or note, with all the indorsements, whether in full or in blank, must be prefixed *verbatim* to the instrument of protest. This is necessary, both to identify the bill or note, and to indicate to the drawer or indorsers what party is entitled to payment⁴. The instrument must then narrate, that the bill or note was presented for acceptance or payment, and must state the answer, if a special one, or otherwise, that the demand of acceptance or payment was not complied with, in order to prove that there has been a failure to accept or pay⁵. Lastly, it must declare, that, in consequence of such failure, the holder is entitled to full recourse against the previous parties. The particulars of his claim under this head shall be afterwards discussed, in considering Action and Diligence on Bills or Notes.

The names of the witnesses to the protest must be stated in the instrument, and it is also proper to mention their designations⁶. But it has been decided, that neither their designations nor their subscription to the protest is necessary, as bills or notes, and protests on them, being instruments *juris gentium*, are not comprehended in the statutory enactments regarding the solemnities of probative writs in Scotland⁷. The

¹ By 55. Geo. III. c. 184, a protest on a bill or note for a sum not amounting to £.20 must pay 2s.; amounting to £.20, and not to £.100,—3s.; to £.100, and not to £.500,—5s.; to £.500 or upwards,—10s.; protest of any other kind,—5s.; and for every sheet after the first, an additional progressive duty of 5s.

² *Barbour v. Newall*, 23d May 1823, 2 S. and D. 328. A bill of suspension was passed partly on the same ground, in *Napier v. Carson*, 17th Jan. 1824, 2 S. and D. 622.

³ *Antea*, 186.

⁴ Pothier, No. 135.

⁵ *Vide* Form of Protest, App., and also Pothier, No. 135. The act 1681 says nothing about the protest, except that the bill shall be prefixed to it; referring, as to its form and contents, to the previous practice.

⁶ 1 Bell, 414.

⁷ *Inglis and Foulis v. M'Kie*, 1697, Forbes, 89. It is probably the same case which is noticed by Fountainhall, Morr. 16971, under the name of *Inglis*

instrument, drawn out in the manner now described, is probative equally against the drawee or granter of the bill or note, and all other parties, unless set aside by a reduction-improbation, and, even in such a process, it has been held not to disprove the instrument, that the witnesses merely did not recollect of the protest¹. It is said², that, in England, when there is no notary at or near the place of payment, an instrument will be sufficient, if drawn up and signed by any respectable inhabitant before two witnesses, and, as to inland bills, there is an enactment to that effect³; but no such rule has been judicially recognised in Scotland.

It has been already shewn⁴, that no bills but those payable at or after sight, need to be presented for acceptance. Bills payable after date, or at some other fixed term, may be presented for payment only, and, if this is refused, it will then be sufficient to protest for non-payment⁵. But if the holder presents separately for acceptance, and it is refused, there must be a separate protest for non-acceptance⁶. On the other hand, it has been held in England⁷, (and the doctrine appears correct,) that if a bill has been protested for non-acceptance,

v. Clark, 21st July 1697; at least the point there decided is, that a protest on a bill is good, though the witnesses neither are designed nor subscribe.

¹ *Berry v. Balfour*, 16th July 1822, 3 Murr. Rep. 116.

² *Bayley*, 259; *Molloy*, 2, 10, 17.

³ 9 and 10 W. III. c. 17, § 1.

⁴ 410.

⁵ In *Jameson v. Gillespie*, 28th June 1749, *Morr.* 1494 and 1579, where a bill, instead of being presented separately for acceptance, was presented only on the last day of grace, and protested once for all for non-payment, the Court, after taking the opinion of merchants both in London and Edinburgh, decided that this was sufficient.

⁶ In *Blessard v. Hirst*, 5 Burr. 2670; *Goodal v. Dolley*, 1 T. R. 712, and *Roscoe v. Hardy*, 2 Camp. 459, 12 East. 434, this doctrine was held in England in the case of inland bills, with regard to the necessity of giving notice of non-acceptance, when the bills were presented for acceptance, and it was refused. In Scotland, where a protest is necessary to preserve recourse on inland as well as foreign bills, the principle of these cases proves that there must be also a protest for non-acceptance, when the bill has been separately presented for acceptance.

⁷ In *Price v. Dardell*, cited by *Chitty*, 467, note 6, Lord Kenyon is said to have expressed an opinion, that notice of second dishonour was unnecessary. In *De la Torre v. Barclay*, 1 Stark. Part 2, 7, where the question turned in some measure on the necessity of a protest for non-payment of two foreign bills, after acceptance had been refused, Lord Ellenborough held, that "a second protest was perfectly gratuitous and unnecessary."

and its dishonour duly notified, it is not necessary either to present it again for payment, and protest separately for non-payment, or to give separate notice of non-payment.

The bill or note must, as already mentioned, be noted for non-acceptance or non-payment as soon as acceptance or payment is refused, and therefore the time for noting must depend on the time for presenting, which has been already fully explained¹. It has been shewn, that in the case of a bill or note payable at a fixed term, presentment for payment must be made, and a protest for non-payment taken, at least by noting, on the last day of grace². It has been held, that, when the last day of grace falls on a Sunday or holiday, the protest must be taken the day before, and that a protest taken the day after will be null³. When the day on which notice of non-payment or non-acceptance ought to have been given, though not regularly observed as a holiday, is one on which the holder's religion forbids him to attend to secular business; for instance, when it falls on the day of a Jewish festival, and the holder is of that religion, it has been decided in England that he will be thereby excused from giving notice till the next day⁴. The same principle seems applicable to the presenting or protesting of bills or notes; since the holder cannot be expected to employ a notary to do that which his religion forbids himself to do. On the other hand, a protest taken the day before would be unavailing, since the debtor, if not of the same religion, would not be liable then to make payment. By a recent statute⁵, it has been enacted, that, with reference

¹ *Antea*, 376, *et seq.*

² *Antea*, 377, and 430.

³ *Smith and Payne v. Laing, Arthur and Co.*, 29th June 1786, *Morr.* 1612. This was the case of a bill drawn and accepted in London, where it was likewise payable. The holder, therefore, maintained, that it must be considered as an English inland bill, with regard to which no protest was necessary. But the answer was, that it had been first indorsed to Laing, Arthur and Co. in Scotland, who afterwards indorsed it to Smith and Payne of London; and that the question arose from a claim of recourse, by the latter against the former, by virtue of the indorsation, which was in law a new bill, and must, as between them, be considered as a foreign bill. The Court virtually sustained this answer, by deciding, as in the case of a foreign bill, that taking a protest on the day after the last day of grace, which had fallen on a Sunday, was not due negotiation.

⁴ *Lindo v. Unsworth*, 2 *Camp.* 602.

⁵ 7 and 8 G. IV. c. 15, § 1-4.

to bills or notes, Christmas days and Good Fridays, or any day of fast or thanksgiving appointed by royal proclamation, shall, for all purposes, and, consequently, with regard to protests, be on the same footing as Sunday, and that, when a bill or note is payable the day before Christmas day or Good Friday, or any such day of fast or thanksgiving, notice of the dishonour shall not be required till the day after these days, or, in the event of their falling on Monday, it shall not be necessary to give notice of the dishonour of bills or notes payable on Saturday, till the Tuesday following. But it is declared that these enactments do not extend to Scotland.

Any cause which has prevented the holder of a bill or note, without his fault, from presenting it, such as his detention by contrary winds, or sickness, his being robbed of the bill, or the like, will excuse him equally for not protesting it¹. But he ought to present the bill or note, and protest it for non-acceptance or non-payment as soon as possible¹. So, when a bill has been indorsed after the term of payment, the indorsee will not require, in order to make good his recourse against his indorser, to protest for non-payment; but it will be enough "to present the bill as a letter of credit, and demand payment, and to notify the refusal to the indorser within a "reasonable time²." The reason is, that the indorsee has been necessarily precluded from protesting within the time during which a protest could be of use. But the previous indorsers will, notwithstanding, be entitled to plead, that *the last indorser*, if he has not protested in due time, has lost his

¹ Molloy, 2, 10, 27, and *antea*, 415; Pothier, No. 114; *vide* 415, and authorities there cited.

² This was decided, in conformity with the opinion of the London merchants, given in the words cited in the text, in *Young v. Forbes*, 19th June 1749, *Morr.* 1580. The bill then in question was drawn at Philadelphia on a person in London, where it was made payable. But both the indorser and indorsee, between whom the question arose, were resident in Aberdeen; so that agreeably to the principle of *Smith and Payne v. Laing, Arthur & Co.* 451, note 3, the bill must, as between these parties, have been considered as a Scotch bill, though the indorsee was probably bound to follow the rules of negotiation established in London, the place where it was made payable. Accordingly, the opinion of London merchants was obtained, to the effect already stated. A similar decision was afterwards given in a question of recourse by the indorsee, against the indorser of a bill indorsed after the term of payment, in *Cooper v. Clark and M'Lintock*, 27th Feb. 1777, *Morr.* 1604, and *App. v. Bill*, p. 3.

recourse against them, and consequently that his indorsee, as coming only into his right, can have no claim against them ¹.

As to the time of day for taking a protest, it has been generally said, that it ought to be taken between sun-rise and sun-set, or at least during the usual hours of business ². In other respects, the rule on this point seems to be the same as with regard to the hour of presentment ³. The rules, also, which have been laid down as to the person to whom and the place where presentment should be made, in the several cases of the bill or note being drawn on or granted by a company or an individual, or of the drawee or granter being dead or absent, are applicable in general as to the person against whom and the place where a protest should be taken ⁴. If two persons of the same name and designation live in the same place, and the possessor of the bill does not, therefore, know to which of them it is directed, but both refuse to accept, he should protest against both ⁵. A protest for non-acceptance ought generally to be taken in the place where acceptance is refused. But it has been said ⁶, that, when a bill is drawn abroad, payable in London, but addressed to a party at some other place, it may be protested for non-acceptance, either in London, or at the drawee's place of residence. The protest for non-payment in such a case must be taken in London. A protest taken, when the drawee cannot be found, and no place of payment is specified, at the head burgh of the county in which he last resided, has been held ineffectual ⁷. Perhaps it should be taken at his last residence ⁸.

The necessity, as well as the mode of protesting a bill, in case of a conditional or partial acceptance, so far as it is not accepted with a view to preserve the holder's recourse against the drawer or indorsers, has been already discussed ⁹. It has been likewise shewn, that, on partial payment of a bill or note, the holder must protest it for non-payment as to the residue ¹⁰.

¹ In the case stated in the preceding note, it seems to be implied, that the indorser was bound to have protested the bill.

² Marius, 112; Forbes, 88.

³ *Antea*, 414 and 436-7.

⁴ *Antea*, 415, *et seq.*

⁵ Scarlett, C. 11, R. 14.

⁶ Marius, 107-8.

⁷ Glendinning's Creditors v. Montgomery, 14th June 1745, Morr. 1449-51.

⁸ *Vid* case in the preceding note, Morr. 1451, where this appears to be suggested.

⁹ *Antea*, 351-2.

¹⁰ *Antea*, 394-5.

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With regard to the words of the instrument of protest, whether for non-acceptance or non-payment, the law does not appear to be very strict, if its meaning is clearly expressed. Thus, in the case of a bill which had not been presented for acceptance, a protest taken against the drawer for exchange, re-exchange, and other damage arising through non-payment, was held to be a protest for non-payment, although it did not bear expressly whether it was taken for non-payment or non-acceptance¹. In the case here mentioned, the Court adopted another doctrine which would not now be followed, viz. that the holder still had his recourse, though he did not take the protest for five months after the term of payment, as the drawer did not prove that he had thereby suffered loss. But the decision as to the import of the protest seems unobjectionable. In another case², a protest was sustained, which bore merely that the bill had been "duly protested," without stating that the protest had been taken at the place of payment, the Court holding that the words "duly protested" implied that every thing necessary had been done, and also taking into view that it was not the general practice to specify in the protest that it had been taken at the place of payment. But, though general expressions will be held to include the particulars falling naturally under them, yet, if the protest enters into particulars, it must bear that the requisites referred to were fully observed. For instance, when a bill was payable, according to its tenor, at the drawee's house, it was held to be a good objection against the protest that it bore presentment to have been made only in the town of Cromarty, where he resided³.

It has been held to be no objection to a protest, that, although it was taken in name of a bank with which the bill had been discounted, the instrument was afterwards extended in name of the chargers, on their taking up the bill from the bank⁴. There is some reason to doubt the soundness of this

¹ *Yuill v. Richardson*, 25th July 1699, *Forbes*, 94 and 95.

² *Commercial Bank v. Hannay*, 24th Feb. 1818, F. C.

³ *M'Kenzie v. Urquhart*, Jan. and Feb. 1731, *Morr.* 1561. This was one of the points stated; but there was also an objection of want of notice of dishonour. The Court were of opinion generally that there had not been due negotiation.

⁴ *M'Kie and M'Omish v. Hilliard and Co.*, 15th June 1822, 1 *Shaw*, 499.

decision¹. But it will afterwards appear that, by special statute², diligence may proceed, under certain circumstances, in name of an indorsee, although the protest should not have been even extended in his name.

The doctrine which has been already stated as to presentment, viz. that the want of it is not excused by the drawee or granter's bankruptcy before the term of payment³, is equally applicable to protests⁴.

If a bill or note is not written on the stamp prescribed by law, the want of a protest will not, more than any other neglect of negotiation, cut off the holder from his claim for any debt on account of which it was given, more than if no bill had been granted.

The diligence or action competent in Scotland, after protest for non-acceptance or non-payment, shall be afterwards discussed.

It has been already considered how far a protested bill or note can be transferred by indorsation⁵.

Although the drawee has accepted the bill, yet, if he has absconded or become bankrupt before the time of payment, so that there is no chance of recovering it from him, the practice in England and on the Continent is, that the holder protests for better security, and gives notice of his protest to the drawer and indorsers⁶. This measure serves only the purpose of notifying the acceptor's situation to the drawer and indorsers, so as to afford them time to make other arrangements for payment. It seems to be settled, that, on the one hand, the holder does not lose his recourse against the drawer and indorsers, though he should not take such a protest; and, on the other hand, that, if these parties refuse to give better security, he cannot sue them on the bill till the term of payment arrives⁷. Such a proceeding was never recognised in Scotland; and, indeed, it seems to be virtually excluded by the statutes regarding diligence and action on bills and notes⁸, which, in describing the procedure to be followed on them,

¹ Vide Chap. on Action and Diligence.

² Act 12 Geo. III. c. 72.

³ *Antea*, 439.

⁴ Vide cases cited 439, note 6.

⁵ *Antea*, 264-5.

⁶ *Marius*, 111; *Beawes*, No. 22-30.

⁷ *Beawes*, Nos. 25-26.

⁸ 1681, c. 20; 1696, c. 36; 12 Geo. III. c. 72.

mention no protests but those for non-acceptance and non-payment, and authorise no measures to enforce payment, either by summary diligence or ordinary action, against drawer or indorsers, before the term of payment, unless in case of non-acceptance, or after this term, in case of non-payment¹. If any of the parties is *vergens ad inopiam* before the term of payment, inhibition may be used to hinder any disposition of his heritage in prejudice of the creditor, or arrestment in the hands of those who owe him money, to attach it.

¹ *Vide Forbes, 96-7.*

SECTION III.

*Acceptance and Payment supra Protest.*1. *Acceptance supra protest.*

This kind of acceptance may be made by any third party, either on a foreign or an inland bill, for the honour of the drawer or any of the indorsers, and yet without their knowledge. But the holder of the bill will not probably be entitled to take it, if prohibited by the party for whose honour it is intended¹. The prohibition, however, though it may void the acceptance in his hands, will not render it ineffectual to third parties. Such acceptance is admitted only when the drawee refuses to accept, has absconded, or has otherwise failed to accept². But it would not perhaps be admitted in Scotland as it is in England³, merely in consequence of the drawee having failed after acceptance, or his credit having become doubtful before the term of payment. For it has been shewn, that no recourse against the drawer or indorsers for better security is competent here in such a case, and such an acceptance is intended merely for their honour, and to save the necessity of recourse. Nor can it take place without a previous protest. But, in the case now supposed, a protest could only be taken by the acceptor *supra* protest, and must then set forth the drawee's failure, not as rendering acceptance necessary to prevent recourse against the drawer or indorsers, as they could not be liable before the term of payment, but merely as the ground of an acceptance for their honour. There does not appear to be any instance of acceptance on such a protest. The only examples of acceptance *supra* protest, known in Scotland, are those which proceed on a protest for non-acceptance by the drawee.

If a bill is drawn, not for behoof of the drawer, but on account of some third party, the drawee, though he do not choose to accept on this party's account, may do it *supra* protest for

¹ Forbes, 75; Scaccia, § 2, Gloss. 5, No. 390; Beawes, No. 36.

² Scarlett, C. 12, R. 8; Beawes, No. 38.

³ *Ex parte Wackerbath*, 5 Ves. 574.

the honour of the drawer; or, when he does not wish to accept a bill for behoof of the drawer, he may do it *supra* protest for an indorser¹. It has been said that the holder cannot refuse such an acceptance, if he has no reason to suspect the credit of the person offering it, or if that person offers good security². But, as every bill is addressed to the drawee, and requires only *his* acceptance, the holder, by taking such a document, does not seem bound to admit any thing but the drawee's absolute acceptance. This doctrine has been held in the English courts³. It is laid down by an author who states the contrary doctrine⁴, that, when the holder refuses such an acceptance, even from the drawee, and protests for want of an absolute acceptance, the latter ought, in prudence, to have his acceptance *supra* protest cancelled. If the holder does not take such an acceptance *from the drawee*, it would appear that he cannot follow out measures against the drawer or indorsers for want of a simple acceptance, since the drawee is liable to him as directly as under an absolute acceptance⁵, the only effect of the acceptance *supra* protest being to give *the drawee* recourse against the drawer or indorser, for whom it is made. Nor will it be necessary, in such a case, for the holder of the bill to give notice to the drawer or indorsers⁶. In this case, the acceptor *supra* protest pays the expense of the protest, as it is taken only for his benefit⁷. There is reason to think, (although the matter does not appear to have been decided,) that the holder may take an acceptance for the honour of the drawee from a third party, and yet sue the drawer or indorsers for want of acceptance by the drawee, as he has not got the security stipulated by the bill⁸. At all events, the holder, by taking an acceptance for the honour of an indorser, will not abandon his right to protest, either against the drawer, or against any prior indorser⁹. If he takes an

¹ Beawes, Nos. 33-4.

² Scarlett, C. 12, R. 6; Beawes, Nos. 27 and 36.

³ Mitford v. Walcot, 12 Mod. 411.

⁴ Beawes, No. 37.

⁵ Scarlett, C. 12, R. 15.

⁶ Ibid. C. 7, R. 16.

⁷ Ibid. C. 12, R. 6.

⁸ This rule is laid down in the modern French Code de Commerce, B. 1, t. 8, § 4, No. 128, and appears, besides, to be conformable with sound principle.

⁹ Scarlett, C. 12, R. 15.

acceptance for the drawer's honour, without protesting for want of an absolute acceptance, he cannot have recourse against him as on a dishonoured bill¹.

Any other person besides the drawee may accept a bill *supra* protest for the honour either of the drawer², or of an indorser³, or both of drawers and indorsers, so as to bind both to the acceptor⁴. It has been even said that the holder of a bill, after protesting it for non-acceptance, may accept it for the honour of the drawer, or of any indorser⁵. In that case, he must give the same notice to the party for whose honour he accepts, which he is bound to give to the drawer and indorsers of the dishonour of a bill⁶. In general, every acceptor *supra* protest is bound to give such notice to the party for whose honour he accepts; and, when such an acceptance is made by another person than the drawee, the holder must give notice, as in case of non-acceptance, to all the other parties against whom he means to preserve recourse.

Several persons may accept *supra* protest, either jointly for the honour of one person, or for the honour of an individual drawer or indorser respectively. A person who intended to accept may refuse to do so with another person; but, if he chooses to accept, he cannot prevent another from accepting with him. Nor does there seem to be any reason why one party should not accept for honour of the drawer, while another accepts for honour of an indorser. For, although the last of these acceptors, as coming in place of the indorser, will have relief against the first, who comes in place of the drawer⁷, that is a matter between themselves, and has no reference to the holder, to whom the indorser, as well as drawer, is directly liable, on non-acceptance *by the drawee*; so that acceptance for the indorser's honour is necessary to protect him, as well as the drawer, from such a claim. There does not, therefore, appear to be any room for a question which has been raised⁸, viz. which must be preferred to the right of thus

¹ Beawes, No. 40.

² Beawes, No. 39; *per* Lord Ellenborough in *Jackson v. Hudson*, 2 Campb. 447; Scarlett, C. 12, R. 10.

³ Beawes and Scarlett, *ibid*.

⁴ Scarlett, C. 12, R. 12.

⁵ Beawes, No. 38; Scarlett, C. 12, R. 9.

⁶ Beawes, No. 34.

⁷ Beawes, No. 42; Scarlett, C. 12, R. 17.

⁸ Forbes, 76-7.

accepting a bill, the person wishing to accept for the drawer's honour, or for the honour of a prior or that of a posterior indorser; since the holder cannot be obliged to take any acceptance not in terms of the bill, and may therefore refuse all or any of these acceptances, while, if he consents, all of them may be adhibited together. If the drawee accepts simply, there is no room for any of them.

It is said that, before a person accepts for the drawer's honour, he should inquire why the drawee has suffered the bill to be protested¹. Though this may be proper for his own safety, it is not necessary to make his acceptance effectual, either to the holder, or to himself, as a ground for claiming relief from the drawer. Such inquiry is not necessary to a person accepting for the honour of an indorser, since neither the claim against him nor his responsibility is affected by the state of accounts betwixt the drawer and drawee². But, it may be proper, even in that case, to ascertain what chance there is of the indorser and his acceptor making good their relief from the drawer's funds in the drawee's hands.

If a person having funds of the drawer or of an indorser, accepts for their honour after he knows of their insolvency, the acceptance cannot operate as a transference of these funds, being only a device for transferring them to the holder of the bill, *in fraudem* of the drawer or indorser's other creditors. But, if he has no such funds, his acceptance does not seem to be challengeable, as it would give him no more than the claim of relief against their estate, which would have been competent to the holder³.

This kind of acceptance, after the bill has been first protested for non-acceptance, is adhibited by the acceptor appearing personally before a notary-public with two witnesses, and declaring that he accepts the protested bill for honour of the drawer and indorser, and will pay it when due. He must then subscribe the bill thus, "Accepted *supra* protest in honour of J. B.;" or, as is more usual, "accepts S. P."⁴.

¹ Beawes, No. 45.

² Scarlett, C. 12, R. 20.

³ Mr Forbes, 75, states, that such an acceptance is void in all cases. In doing so, he follows the authority of Scaccia, § 2, Gloss. 5, No. 391. I have presumed to lay down the distinction stated in the text, as it appears to be more conformable with sound principle.

⁴ Beawes, No. 38; Chitty, 376.

He likewise, it is said, generally subscribes, under the protest, a doquet, bearing that he will pay the sum contained in the bill¹. The whole of these proceedings must be narrated by the notary in form of instrument, which ought to be sent without delay, with notice of the acceptance, to the party for whose honour it is made. Unless the nature of the acceptance is expressed as now stated, the acceptor will have no recourse against any of the parties². Such proceedings are necessary to bind the party for whom the acceptance is made; and also as a precaution against the chance of the drawee, after accepting simply, prefixing to his acceptance, on hearing of the drawer's failure, "accepted *supra* protest for the honour "of the drawer or some of the indorsers³." This kind of acceptance, therefore, cannot now be interposed, except in the manner already stated, and after a protest for non-acceptance. An acceptance "*supra* protest," generally, is understood, unless the contrary is expressed, to be made for honour of the drawer.

An acceptor *supra* protest is bound absolutely to the holder of the bill for its amount, without regard to the protest⁴, that being intended only to regulate his claim of relief. But his obligation is only conditional, viz. in case the drawee should fail to pay; and therefore, although the drawee has refused acceptance, yet, as he may pay, the bill must be protested for non-payment before the acceptor *supra* protest can be liable⁵. It was once held, in a case where a party (after the drawee had refused to accept) accepted for honour of the

¹ Chitty, 374.

² *Carstairs v. Paton*, 15th Dec. 1703, Morr. 1529.

³ Forbes, 74.

⁴ Implied in *Mitford v. Walcot*, 12 Mod. 411.

⁵ This was decided, after a full consideration of authorities, by the Court of King's Bench, in *Hoare v. Cazenove*, 16 East. 391; vide also Pothier, No. 137. Beawes, No. 43, has a passage which seems to imply that an acceptor *supra* protest is liable in all events. But it was held, in the foregoing case, 1st, That that passage admitted of a different construction; and, 2dly, That, at any rate, it could not weigh against the other authorities. A similar decision was also given by the Court of King's Bench in *Williams v. Germaine*, 7 B. and Cr. 468, 1 M. and Ryl. 394, where a bill payable 30 days after sight, from the date of presentment for acceptance, which would have made the day of payment 14th August, having been refused by the drawee, but accepted for the drawer's honour, payable 22d August, it was held, 1st, That, to give a claim against the acceptor, or against the drawer, it was necessary to present it to the drawee for payment, only on 22d August; but, 2dly, That, when presentment to the drawee

drawer, but only to be paid if the bill be "regularly protested and refused;" that, in consequence of such an acceptance, the bill, though made payable in London, must be again presented to the drawer for payment, at his residence, (Liverpool,) and protested, before it could be validly presented for payment to the acceptor *supra* protest in London¹. The decision was rested on the peculiar terms of the acceptance. But, though it had been in general terms, it seems to have been held, that, according to the practice, presentment at the drawer's residence, though not necessary, would have been good. By a subsequent statute, however, already noticed², it is enacted, that, when a bill made payable at a different place from that of the drawee's address, has been presented for acceptance, and that has been refused, it may be protested, without farther presentment, at the place of payment, unless the holder makes payment on the day when the bill falls due.

If the acceptance *supra* protest is general, or bears to be for honour of the drawer, the acceptor will be liable to all the subsequent indorsees; if for the honour of a particular indorser, he will be liable to the parties after this indorser. On the other hand, he will have a claim of relief for the amount of the bill, and for all costs and charges³, against the party for whose honour he accepted, and against the previous parties, who are liable in relief to his principal⁴. But, to secure this recourse, notice must be given to all these parties, either by him or his principal, or by some other party interested, of the acceptance *supra* protest, as required with regard to notice of dishonour. The acceptor *supra* protest has no claim against any parties subsequent to the person for whose honour he accepted. For instance, an acceptor for the drawer has no claim against an indorser, nor an acceptor for the honour of

for payment was not averred in the declaration, (though the bill was averred in general to have been duly presented,) judgment must be arrested, both against the drawer and against the acceptor for his honour.

¹ Mitchell v. Baring, 10 B. and Cr. 4; 1 M. and Malk. 381; 4 C. and Pay. 35.

² 2 and 3 W. IV. c. 96, *antea*, 444. *Vide* Chitty on the object of this statute, 806, note a, *Addenda*.

³ Scarlett, C. 12, R. 19.

⁴ Beawas, No. 49; *vide* Smith v. Nissen, 1 T. R. 269, which, although it was a case of *payment supra* protest, involved the same principle.

a prior indorser against a posterior indorser¹. If the holder of a bill accepts for honour of a certain party, he can have no claim of relief *as acceptor* against the indorsers subsequent to that party, though he does not lose his claim against them as holder. Nor can he proceed against them as for non-acceptance, since his acceptance was intended to relieve the party for whom it was made from being sued for non-acceptance, and must, therefore, produce the same benefit to them, who are in his right. His claim against them as holder cannot be effectuated till the bill has become due.

The drawee of a bill, after it has been protested for non-acceptance and accepted *supra* protest, may still adhibit his acceptance, for example, on getting new advice from the drawer; although the holder is not therefore bound to release the party who has accepted *supra* protest². In such a case, the drawee must pay the acceptor *supra* protest his charges, which are available against the drawer and indorsers, and must therefore be good against him³. So, a party accepting for the drawer's honour must refund these charges to a person who has accepted *supra* protest for the honour of an indorser.

2. *Payment supra protest.*

When payment of a bill, whether foreign or inland, or of a promissory-note, has been refused, any person not a party to it may pay it, for honour either of the drawer or any of the indorsers⁴. But he cannot, it is said, be allowed to pay for honour of a party against his express orders⁵, and he will acquire no right of action by so doing. The drawee of a bill, as he may accept, may also pay *supra* protest, for the honour either of the drawer or of any indorser, unless he has previously accepted simply; in which case he cannot pay for the honour of an indorser, because he is then bound to all the indorsers absolutely, whether he has effects of the drawer or not⁶. But, if he has not effects, and this can be proved, notwithstanding his acceptance, by the drawer's writ or oath, he may suffer the bill to be protested, and pay *supra* protest, whereby he will have

¹ Beawes, No. 49.

² Scarlett, C. 12, R. 16-17; Forbes, 77.

³ Dupuy de la Serra, C. 9, No. 21.

⁴ Ibid. No. 41.

⁵ Marius, 128.

⁶ Beawes, No. 51.

recourse against the drawer¹. He will not, however, be entitled to summary diligence against the drawer on the bill, because *ex facie* of it he is the proper debtor. In general, no party ought to pay a bill or note for honour of any other party, unless it has been previously protested for non-payment. Nor can payment be safely made, if the protest has been taken beyond the days of grace, because such a protest is null². Even a person who has previously accepted *supra* protest, as has been shewn, is not bound to pay, till the bill has been protested for non-payment, as well as for non-acceptance, against the drawee³. It is said, indeed, that he may pay without such a protest for non-payment, if the person for whose honour he accepted has, in the meantime, approved of his acceptance⁴. But a person who has not previously accepted *supra* protest, besides requiring a protest for non-payment, must also, to pay safely, declare before a notary that he does so in honour of the drawer or some other party, and such declaration must be engrossed by the notary, either in the protest for non-payment, or in a separate instrument⁵. It has been argued, and with justice, that no such protest requires to be taken before payment, by a person who has previously accepted *supra* protest, because he must be presumed to pay under the qualifications expressed in his acceptance⁶.

The rules regarding notification of payment *supra* protest to the party for whose honour it is made, by sending the protest on which it proceeds, or otherwise, are the same as with regard to acceptance *supra* protest⁷. It is said, indeed, that, when the acceptor *supra* protest lives in a different place from the original drawee, so that notice of the latter's non-payment of the bill cannot be given on the day when it has been protested against him for non-payment, a reasonable time will be allowed for giving notice⁸. In general, such notification, to secure recourse, must be given within the same time as noti-

¹ Beawes, No. 52.

² Forbes, 115.

³ *Antea*, 493.

⁴ Beawes, No. 48.

⁵ Scarlett, C. 18, R. 4; Marius, 128; Beawes, No. 53. The extension of a regular instrument of protest at the term of payment, and not afterwards, was held necessary, in order to authorise recourse on a payment *supra* protest, in the case of *Vandewall v. Tyrell*, 1 M. and Malk. 88; Chitty, 337, note *f*.

⁶ Forbes, 116-7.

⁷ *Antea*, 490.

⁸ Chitty, 381.

fication of the dishonour of a bill is given by the holder to the drawer or indorsers¹. The period, therefore, of fourteen days, which, as shall be afterwards explained, has been allowed in Scotland by statute for notifying the dishonour of inland bills, would probably be also allowed for notifying the acceptance or payment of such bills *supra* protest.

It has been said, that the holder of a bill is not obliged to take payment *supra* protest, unless the party offering it de-

¹ Dupuys de la Serra, C. 10, No. 10. Scaccia, § 2, Gloss. 5, No. 362, refers to a case which was decided on the same principle. Forbes, 114, refers to these authorities, and repeats their doctrine. There is one case, Ochterlony v. Hunter, 28th Dec. 1743, decided on appeal, 9th April 1745, Morr. 1567, and Appeal Cases, the ultimate decision of which cannot be easily reconciled with this doctrine. In that case, a party wrote a letter on 26th May to the drawer of a bill, intimating that he had paid *supra* protest all the previous bills of his which had fallen due since 18th March, and mentioning also that the "amount of the whole, *when all retired*, may be about £.5318." In a subsequent action by him on these bills against the drawer, as being paid by him *supra* protest for the drawer's honour, it was questioned, whether this was sufficient notice of the payment, *1st*, Of certain bills which had been paid a considerable time before the date of the letter; *2dly*, Of a bill which had fallen due on 18th May; *3dly*, Of one which had fallen due on 22d May; and, *4th*, Of certain bills which were paid afterwards. Three Scotch bankers, to whom a remit had been made, reported that the practice was to give notice in such cases *by the second post at farthest*. On the other hand, certain London bankers reported it as the practice there, to allow fourteen days for giving notice. The Court of Session ultimately found that there was not sufficient notice regarding any of the bills, excepting that which fell due on 22d May; thus holding that four days, the period within which notice of it had been given, was sufficient. But the pursuer, who had paid *supra* protest, having appealed, the House of Lords found that the letter of 26th May was sufficient notice regarding the bills which were paid after its date, and also with regard to the bill which fell due on 18th May, seven days before its date. The precise ground of this judgment does not appear. It may, however, be gathered from the report of English bankers referred to, that it was probably influenced by a practice which seems to have then prevailed under the 9 and 10 Will. III. c. 17, of not giving notice of the dishonour of any protested inland bill for fourteen days after its dishonour. But, *1st*, This act seems applicable only to English inland bills, which the bill in question was not; and, *2dly*, It has been held in many recent cases, even of English inland bills, to be afterwards mentioned, that notice of their dishonour must be given without delay, in order to preserve recourse *on the bill*, and that this act relates only to notice of the *protest*, which is required by the act with regard to inland bills, for no other purpose than to preserve a claim for damages, &c. It may therefore be doubted whether this case can be considered as a precedent. But, in the case of Scotch inland bills, the 12 Geo. III. c. 72, has allowed fourteen days for intimating their dishonour; and the same period, therefore, would probably be allowed for intimating the acceptance or payment of them *supra* protest.

clares that the credit of the person for whom he offers it was specially recommended to him¹. But it may be doubted whether he can refuse such an offer of payment on any ground.

It has been stated, that, when several parties offer to pay a bill or note *supra* protest, preference must be given to him who offers payment for the honour of the drawer, and to him likewise who offers payment for a prior indorser, over him who offers it for a posterior indorser². The principle appears to be, that payment ought to be taken from the person coming in place of the party by whom the bill or note is most properly due. But the case is not likely to occur. The party who has paid for honour of a posterior indorser must, it is said, take back his money, unless he has already redrawn it, from any party offering to pay for the drawer or for a prior indorser, provided such party indemnifies him for his charges, to which he has the same claim that an acceptor for honour of a posterior indorser has against the acceptor for honour of the drawer, or of a prior indorser³.

A person paying a bill or note for honour of a party to it, even without his knowledge or consent, is said to be entitled to require from the holder a transference of his right⁴. But he cannot be entitled to an absolute transference, because his mode of interference excludes him from having such a claim as the holder would have had, against parties posterior to the individual for whose honour he pays. On the other hand, though he has got no formal transference, he will have the same claim on the bill or note that the holder could have made against the party for whose honour he made payment, and against the parties liable to him⁵. He has therefore a claim

¹ Scarlett, C. 18, R. 6; Beawes, No. 55.

² Forbes, 115.

³ Forbes, 115, *antea*, 462.

⁴ Scarlett, C. 18, R. 7.

⁵ Scarlett, C. 18, R. 5. This rule was followed in *Mertens v. Winnington*, 1 Esp. 112, where a party paying for the honour of an indorsee was found entitled to recover against the drawer. Lord Kenyon, in this case, laid it down generally, that a party so paying acquires thereby all the indorsee's rights, so as to be entitled to recover from the different parties to the bill. But it does not appear that he can recover from any except the party for whose honour he paid, or the parties prior to him on the bill. This is all the right which his payment *supra* protest appears to carry, since it merely puts him into the situation

against the acceptor who has failed to pay, because he, being primary debtor, is liable to all the other parties, and therefore to the party for whose honour payment has been made. But if the drawee has accepted without value from the drawer, and this is proved in Scotland by his writ or oath, the party paying for the drawer's honour, being only in his right, will have no claim against the acceptor¹. A party paying for the honour of an indorser will not be affected by this circumstance, because the indorser, in whose right he stands, has a claim independent of it. In England, where acceptances are admitted on a protest for better security, after the drawee has accepted, (lest he should become bankrupt,) a person who has accepted even for the drawer's honour, after an acceptance by the drawee, has been found entitled to claim on the drawee's estate². But such a party, having accepted before the term of payment, was probably led to do so by the drawee's acceptance, which warranted him to believe that the latter's funds, at least so far as they went, would be applied in payment of the bill, whereas a person paying after the drawee had failed to pay, could not be supposed to rely on him. Such a person is justly placed in the situation of the party for whose honour, and in reliance on whose credit he made payment.

of the party for whose honour he pays. He cannot, therefore, be considered as an indorsee to all intents and purposes. There is no decision finding him entitled to claim from a party posterior to the person for whose honour he has paid. The doctrine now stated is confirmed by Bayley, 329, and by the case of Hall v. Pitfield, there cited by him. *Vide* on the same subject, Smith v. Nissen, 1 T. R. 239, where a person paying for the honour of the drawers was found entitled to recover from them.

¹ *Ex parte Lambert*, 13 Ves. 179.

² *Ex parte Wackerbath*, 5 Ves. 574.

SECTION IV.

Notice of Non-acceptance or Non-payment.

1. Necessity of notice.

When acceptance or payment of a bill, or payment of a note is refused by the drawee or grantor, or is not made in terms of the bill or note, it is necessary, to preserve recourse against the other parties, that notice should be given them of non-acceptance or non-payment. This rule is equally applicable, though under different modifications, to foreign and to inland bills. The purpose of it is, that the several parties may take measures to secure themselves, by recurring against the persons liable to them respectively on the bill or note; for instance, that the drawer may, on non-acceptance, withdraw his effects from the drawee, and that the other parties may seek payment or relief from those prior to them. But the rule is not relaxed, although it should appear that the previous holders have not been prevented, by want of notice, from doing all which they could otherwise have done for their indemnity. This would, indeed, appear, at first sight, to be the natural result of the principle now stated; and, accordingly, it was once held both in Scotland and England, that the party pleading want of notice must prove that he had thereby suffered damage. But the contrary rule is now settled, viz. that failure in giving due notice, or in any other step of negotiation, absolutely bars recourse, and that it is not competent to inquire whether injury has been thereby sustained or not¹. The principle of this rule appears to be, that, although the original purpose of requiring notice of dishonour

¹ In illustration of the old law on the subject, *vide* Swinton v. Lady Craigmillar, 28th June 1706, Morr. 1548; Brown v. Hume, 14th Nov. 1705, Morr. 1546; Yuill v. Richardson, 25th July 1699, Forbes, 94, Morr. 14996; M'Kenzie v. Urquhart, Jan. and Feb. 1731, Morr. 1561, and opinions expressed by some of the judges in Henderson v. Duthie, 19th Jan. 1799, Morr. App. v. Bill, p. 9. In support of the doctrine now established, *vide* Littlejohn v. Allan, 12th Dec. 1746, Morr. 1569; Langley v. Hogg, 17th June 1748, Morr. 1574, and cases cited 439, note 6. In the former edition these cases were noticed in detail; but this has been now deemed unnecessary.

was to enable the parties receiving it to avoid loss, it is more beneficial to the commerce of bills to deny recourse, wherever such notification, or any other step of negotiation has been neglected, than to allow an inquiry in each case, whether damage has been thereby sustained or not. The same rule, after a similar fluctuation of opinion, has been adopted in England ¹. It has been held, for instance, agreeably to the doctrine already explained ², both that the drawer must be presumed to have value in the drawee's hands, and that the indorsee has given value to the indorser ³; and, in a case betwixt an indorsee and drawer, where the latter pleaded want of notice, the indorsee was not allowed to prove, in answer to the objection, that the drawer had not thereby suffered loss, as his effects were still entire in the drawee's hands; it being laid down, that "the only case in which notice is dispensed with, is where "there are no effects of the drawer in the drawee's hands ⁴." The nature and limits of this exception to the doctrine of notice shall be afterwards considered. There is another apparent exception, viz. that, when a bill written on a wrong stamp was indorsed in payment of goods, the indorser was held not to be discharged from the price of the goods, by want of notice of the dishonour of the bill ⁵. But this decision proceeded on the ground that there had been no payment, as there was truly no bill. In all ordinary cases, the rule as to notice is absolute. It is a farther illustration of the rule, that the decisions already quoted ⁶, to shew that the holder cannot be excused by the failure of the acceptor, or any of the other obligants in the bill or note, are applicable to notice, as well as to any other step of negotiation.

2. Form and contents of notice.

No particular form is required in giving notice. But every notification implies, and it is advisable to make it express distinctly, 1st, That the bill or note has been dishonoured by

¹ Chitty, 483, and cases therein cited, all of which either establish or imply the necessity of notice; *vide* also cases cited *antea*, 439, note 6.

² *Antea*, 89, *et seq.*

³ *Per* Buller, J., in *Bickerdike v. Bolman*, 1 T. R. 406-9.

⁴ *Per* Lord Kenyon in *Dennis v. Morrice*, 3 Esp. 158.

⁵ *Cundy v. Marriot*, 1 B. and Ad. 696.

⁶ *Antea*, 439, note 6.

non-acceptance or non-payment, or at least by not being accepted or paid agreeably to its tenor¹; 2*d*, That it has been in consequence protested; and, 3*d*, That the holder claims recourse from the party to whom the notice is addressed, for principal sum, interest, costs and re-exchange². These particulars, however, are seldom all expressed, nor is it necessary. For instance, although every notice must *import* that payment is expected from the person receiving notice, this need not be stated expressly, since the circumstance of the holder giving notice implies that he looks for payment to the person receiving it³. The same thing is implied even when the notice comes from another person than the holder, as from an indorser, who has got notice, and has a claim of recourse against the person to whom he gives it. Nor must the notice always bear that the bill or note has been protested; and, indeed, in one case⁴, where it stated expressly that the bill *had not been protested*, the Court held this to mean merely that the instrument of protest *had not been extended*, and that it was still left to be understood that it had been noted. But it has been held in England⁵, that a letter to an indorser demanding payment was not sufficient notice, as it did not state expressly that the acceptor had failed to

¹ In *Margeson v. Noble*, 2 Chitty, R. 364, notice of non-payment was held sufficient, though accompanied by a statement, that the maker of the note said that he would pay in a week.

² *Vide* 1 Bell, 413-14.

³ This appears to be the fair construction of the opinion expressed by the Court of King's Bench in *Tindal v. Brown*, 1 T. R. 167. In that case, before the holder of a note had given notice, the granter had notified its non-payment to the defendant, who was an indorser, and asked him to make payment. But the Court held that the plaintiff could not found on this as notice, since mere knowledge of the dishonour was not sufficient, without such notice as *imported* that the holder of the note looked to the defendant for payment. It was not said that this ought to be expressly stated. There was another question, viz. Whether the plaintiff had given timely notice, on which the jury found twice for him. But, the third time, a special verdict being returned, and the Court having thereupon given judgment for the defendant, their judgment was affirmed by the Exchequer Chamber.

⁴ *Brown and Co. v. Hutchison Dunbar*, 8th Dec. 1807, *Morr. App. v. Bill*, 27.

⁵ *Per* Abbott, C. J., in *Hartley v. Case*, 1 C. and Pay. 555. A rule for a new trial was afterwards discharged, after full argument; 4 B. and Cr. 339; 6 D. and R. 505.

pay, or even that the bill had been accepted. It has been also decided¹, that a letter from the holder's agents, stating that they would take measures to recover payment, if not made, was not sufficient notice, and did not imply that the bill had been dishonoured, which must be intimated, as well as that the holder looks to the party for payment.

It is not now held necessary that notice should be accompanied by the bill, or by the principal, or a copy of the protest², even in the case of a foreign bill. It does not even seem requisite to mention that there has been a protest, when the person receiving the notice is in this country at the time

¹ *Solarte v. Palmer*, 7 Bingh. 530, affirmed by the Exchequer Chamber and House of Lords, 1 Bingh. N. S. 194.

² *Cromwell v. Hynson*, 2 Esp. 511. In this case, where the defendant, the indorser of a foreign bill, was in Jamaica at the time of protesting it for non-payment, one objection was, that notice ought to have been accompanied with a copy of the protest. But Lord Kenyon overruled this, as well as all the other objections. The same objection has been repeatedly overruled in Scotland. In *Johnston v. Murray*, 1st Feb. 1715, Morr. 1556, it was held to be no objection that the holder had not, on notifying non-payment of a foreign bill, sent the protested bill to the drawer to enable him to recover payment from the acceptor. In *Johnston v. Hogg*, 21st July 1747, Morr. 1570; *Elchies, v. Bill*, No. 37, which was the case of a foreign bill, as between the indorsee and indorser, betwixt whom the question of recourse arose on its non-payment, it was objected *inter alia*, that there could be no valid intimation of non-payment, without sending the bill and protest. No judgment was given on the objection, although the Court expressed an opinion that the protest only should be sent, (the holder not being bound to part with the bill,) and that this did not require to be done by the first post, but within a reasonable time. But it was more recently decided to be unnecessary to send even the protest. In *Hawkins and Co. v. Cochrane*, 24th June 1757, Morr. 1581, which was an action of recourse brought by the holder against the drawer of a foreign bill on its non-payment, the Court repelled the defence, that the bill and protest had not been sent to the drawer for thirty-nine days after it was dishonoured, both of them having been sent in the mean time to London, to try whether payment could be got there. The Court were of opinion, that the holder could not be asked to part with his document or diligence till he got payment, and that he was not bound to have a correspondent at every place where the drawer or an indorser resided, to give them up as soon as he got payment. A similar decision was afterwards given in *Coutts and Co. v. Nisbet*, 18th Dec. 1760, Morr. 1586, which was an action by the indorsee against the original payee of a promissory-note, no regard being paid to the defence that the bill and protest had not been sent to the defender for a month after the date of the protest. In both these cases, if the transmission of the protest, even within a reasonable time, had been held a necessary step of negotiation, recourse must have been refused, and it was allowed solely on the ground that such a measure was not indispensable.

of the dishonour, as he may then ascertain the fact, though it should not be notified to him¹. But, if he is abroad, the fact of a protest having been taken ought to be mentioned in the notice, since he is not otherwise supposed to be aware of it². If he afterwards requires a copy of the protest, it must be sent to him³.

The notice of dishonour must give such a specification of the bill, as leaves no doubt of its identity. In a case⁴, where the indorsee of a bill claimed recourse from the indorser on its non-payment, the Court decided, that the notice was insufficient, as it merely mentioned that the holder had been obliged to draw on him on account of a *bill of* £.150, the amount of the bill in question, but without specifying the bill, although the draft alluded to in the notice was presented for acceptance. It was held, that the notice ought to be so specific, that the indorser might, on receiving it, have safely attached the drawer's effects for his relief; whereas here, he might have been liable in damages for doing so, as the notice might relate to some other bill with which the drawer had no concern.

When the drawee offers only a partial or conditional acceptance, or when acceptance *supra* protest is offered, which the holder does not choose to take unconditionally, notice of it ought to be given to the drawer or indorsers, to preserve recourse against them on the bill, so far as the acceptance is not in terms of it. But even neglect to give such notice is obviated when the condition of the acceptance is fulfilled, as it then becomes an absolute acceptance⁵. The notice ought to specify the kind of acceptance offered; because, if it is merely a general notice of non-acceptance, it will be presumed that the holder refuses it⁶. Although no notice of such an acceptance should be given, the drawer and indorsers will

¹ *Per* Lord Ellenborough in *Robins v. Gibson*, 3 Campb. 334; 1 M. and S. 298.

² *Per* Lord Ellenborough, *ibid.*

³ 1 Bell, 415.

⁴ *Johnston v. Hogg*, 471, note 2.

⁵ *Bayley*, 254.

⁶ In *Sproat v. Matthew*, 1 T. R. 182, where the holder of a bill, on being offered a conditional acceptance, had noted the bill for non-acceptance, this was held to imply a rejection of the acceptance. The same principle seems applicable to notice. The rule is so laid down by *Bayley*, 254.

be bound to the extent of the acceptance¹. If any person, whether drawee or not, accepts for honour, either of the drawer or of an indorser, he must intimate his acceptance under protest, and send the instrument of protest to the person for whose honour he accepts, if he means to preserve his recourse against him².

In a case where the holders of a bill, being bankers, were agents, both for the drawers, whom they had credited with the bill in their account, and for the acceptors, and where the bill was made payable at their bank, it was decided, that, though the acceptors had sent them orders not to pay it, they were not bound to communicate these confidential orders to the drawers, but that their recourse would be preserved by a general notice of non-payment³.

3. Notice—How given?

It is not necessary that notice should be in writing, although this appears to be the practice in Scotland, even where both parties are neighbours⁴. Verbal notice has been repeatedly held sufficient. Thus, where the cashier of a bank had received notice of the dishonour of a bill by a letter from London, it was held sufficient that he had given verbal notice to the parties from whom recourse was claimed, by shewing them the letter⁵. In another case⁶, though the point was not decided, the Court held, that verbal intimation, when proved, was sufficient; and⁷, when the Lord Ordinary had restricted the party claiming recourse to a proof of notice by letter, the Court remitted to allow a proof at large, being “clearly of opinion that it was not necessary to intimate the dishonour of a bill in writing.” The same doctrine is settled in Eng-

¹ Chitty, 361, Bayley, 254.

² Beawes, No. 34, *antea*, 462.

³ Crosse v. Smith, 1 M. and S. 545.

⁴ *Vide* Report of Sir William Forbes & Co., and of Mansfield, Hunter & Co. in Colebrooke & Co. v. Douglas, 18th July 1780, Morr. 1605, the substance of which report is, that, where the parties are neighbours, they generally give notice by a card, which is not entered in the letter-book, except in cases requiring peculiar caution.

⁵ Colebrooke and Co. v. Douglas, note 4.

⁶ Stirling Banking Company v. Duncanson's Representatives, 20th Feb. 1784, Morr. 1611.

⁷ Syme v. Ferguson, 25th June 1813, F. C.

land¹. In one of the cases now cited, relating to a Scotch inland bill², where an execution of horning was produced, which bore that a charge had been given to the indorser's representative, within the proper period for notice, but was afterwards reduced as irregular, it was decided, likewise, that it could not be evidence even of notice, there being no proof of a charge independent of it.

It is not necessary that notice should be received personally by the party concerned; it is sufficient, if he is a merchant or banker, that verbal notice be left at his counting-house or place of business, or, if he is not in trade, that it be left at his dwelling-house. It has been decided in England, that, if the holder sends to a merchant's place of business, within ordinary business hours, to give notice to him verbally, and no person can be found there, it is not necessary to deliver any message to a servant, or to leave a written notice, as every merchant should have some person at his place of business capable of receiving notice³. His failing to do so has been held a refusal of payment⁴. It is therefore not ne-

¹ *Crosse v. Smith*, 1 M. and S. 545, and *Goldsmith v. Bland*, Bayley, 276. Both cases shall be immediately stated with reference to another point.

² *Stirling Banking Company v. Duncan's Representatives*, 20th Feb. 1784, Morr. 1611.

³ *Goldsmith v. Bland*, per Lord Eldon, at Guildhall, Bayley, 276. In this case the plaintiff's clerk, being sent, during business hours, to the defendant's counting house, to give notice, was told by a servant girl that there was nobody in the way, and left no message. Yet it was held that enough had been done to give notice.

⁴ *Crosse v. Smith*, 1 M. and S. 545, per Lord Ellenborough. In this case, where a clerk, on being sent to the counting-house of a company to give verbal notice, found it shut betwixt 10 and 11 A. M., it was held that enough had been done to give notice. No notice was sent to the house of any of the partners, though one of them resided ten miles, and another only one mile from Hull, where their place of business was. Similar doctrine was held as to the sufficiency of calling at a counting-house during business hours to give notice, though the counting-house was shut, by Bayley, J., in *Bancroft v. Hall*, Holt, 476. In *Bowes v. Howe*, 16 East. 112, Lord Ellenborough expresses an opinion, that the shutting up of a counting-house during business hours was a refusal to pay, and, on that ground, the Court of King's Bench held, that the presentment of particular notes for payment was unnecessary. But their judgment was reversed by the Exchequer Chamber, who held, that there was no refusal to pay *these particular notes*, and that they could not be considered as dishonoured *till they were presented*. But, if they had been presented, the circumstance of the counting-house being shut would, as in the case of a clerk

cessary, in such a case, to send notice to his residence¹. It has been held, however², that intimation by a servant that she did not know where the party was, did not excuse the want of notice. But the case turned ultimately on another point. Notice to an attorney will be of no effect, unless he has special powers from his constituent³.

Although verbal notice, if proved, does not appear to be excluded, even when the parties reside in different places, it is most convenient, in such a case, to send notice by letter. The post being the authorised channel for transmitting letters, it is in all cases safest to send them by it. If it is proved that a letter containing notice was put into the Post-office properly addressed, but only in that case⁴, this will be sufficient to preserve recourse, whether the letter has been delivered or not⁵. The same rule is applicable in London, to

calling to give notice, have been held to supersede the necessity of doing any thing else.

¹ *Crosse v. Smith*, 474; note 4.

² *Harris v. Richardson*, 4 C. and Pay. 522.

³ *Crosse v. Smith*, 474, note 4.

⁴ In *Walter v. Haynes*, 1 R. and M. 159, Abbott, C. J., held it not sufficient to prove that a letter of notice had been put into the Post-office, addressed "Mr Haynes, Bristol," such an address to a place like Bristol not being sufficiently specific. But the plaintiff had a verdict, on bringing other evidence to prove that the defendant had received the letter. *Vide* on this subject, *Henderson v. Duthie*, *post*, 494. In an English case, *Mann v. Moors*, 1 R. and M. 249, where the drawer of a bill had dated it "Manchester," Abbott, C. J., held, that a letter addressed to him, "Mr Moors, Manchester," was correct in its address, because, by dating the bill "Manchester," he raised a presumption that a letter so addressed to him would reach him. In a Scotch case, *Milligan v. Barbour*, 7 Sh. and D. 489, and F. C., it was decided that a letter addressed Wm. Milligan, Trench, Dumfries, (a village near Dumfries,) was not properly addressed to a person residing in a neighbouring village, called Stoop, (Dumfries being the post-town of both villages); and that, therefore, there was no proof of due notice, it not being shewn that the party had got the letter.

⁵ This was decided in England, in *Sanderson v. Judge*, 2 H. Bl. 509; and the authority of that case was recognised in *Parker v. Gordon*, 7 East. 385, where Lord Ellenborough having at first directed the Jury, that evidence of putting a letter of notice into a Post-office was not sufficient, unless it was likewise proved that it had reached the drawer, it was afterwards held, on the case of *Sanderson v. Judge* being cited, that this was a sufficient ground for granting a rule to shew cause. But the case was decided on another ground. The same doctrine was held by Lord Kenyon in *Kufh v. Weston*, 3 Esp. 54, where it was found sufficient, that a letter notifying non-acceptance had, with the

letters of notification put into the two-penny post ; it being held that putting them into it in due time is sufficient as to parties residing within the limits of that post, whether the letters reach them or not ¹. It will also be sufficient, in Edinburgh, to put such letters into the penny post ². But such notice must be put into a regular Post-office ³. The post-mark will be held good evidence of the letter being put into the Post-office, and of the date of putting it in ⁴. If a person sends notice by a private hand, when he might have the benefit of the post, it would seem, though the point has not been expressly decided, that he thereby takes on himself the risk of irregularity in the conveyance, since he is blameable for not adopting the most secure conveyance. At least, if the conveyance arrive much later than the post, the delay must rest with him ⁵. It is difficult to lay down a precise rule as to the

protest, been put in due time into a Post-office in Italy, though the course of post had been retarded. The rule was also recognised in *Haynes v. Birks*, 3 Bos. and Pull. 599, and by Lord Ellenborough in *Langdon v. Mills*, 5 Esp. 157, though his Lordship held, that the plaintiff could not be allowed to prove the letter, without giving the defendant notice to produce it, as it might afford material evidence ; for instance, of the date from the post-mark, or otherwise.

The rule now stated was recognised by the Court of Session in *Stewart v. Wright and Scott*, 13th Dec. 1821, 1 Shaw, 213, where the dishonour of a bill was found to be sufficiently notified by putting a letter of notification into the Post-office, though the party to whom it was addressed denied that he had received it.

¹ This doctrine was held, among a number of other points, in *Scott v. Liford*, 1 Camp. 246, *per* Lord Ellenborough. The same thing was held by Lawrence, J., in *Hilton v. Fairclough*, 2 Camp. 633, where the putting of a letter into the two-penny post in due time was found sufficient ; also in *Dobree v. Eastwood*, 3 C. and Pay. 250.

² 1 Bell, 416.

³ This doctrine follows by analogy from the doctrine laid down, *antea*, 318, and the cases there cited.

⁴ *Per* Lord Ellenborough in *Arcangelo v. Thomson*, 2 Camp. 622. The question here related to the transmission of an order to effect a policy of insurance, which was held to be proved by production of a letter from the place whence the order was transmitted, bearing the English ship-letter post mark, 1797.

⁵ This doctrine may be gathered from the opinion expressed in *Darbishire v. Parker*, 6 East. 12-13. In that case, the person claiming recourse, having himself got notice on 12th June, sent it to the defendant on the 13th, not by post, but by a private hand, which arrived two hours later than the post, but an hour before the departure of the post, from the place of arrival, for London. It was held, that the late arrival of the notice had prevented the drawer, who

extent of delay in the arrival of a private conveyance which will nullify the notice, although such delay as prevents the person getting notice, even for one post, from sending advice to his correspondent, will probably be fatal¹. It would likewise appear, that in such a case the holder must prove the safe arrival of the letter. But, when a person, instead of sending notice directly by post, writes to a correspondent on the spot to give notice, and that correspondent goes to the defendant's warehouse for this purpose, sooner than a letter could have reached him by post, but is prevented by finding the warehouse shut during business hours, the defendant cannot plead the lateness of the notice². Farther, if it is necessary to send notice by a special messenger, as where the party receiving it lives out of the course of the regular post, the expense of such notice will be allowed³; and the person giving it will not be responsible for the accidental delay of the conveyance, as he could not have employed any other. When notice is to be sent abroad, to a place to which there is no post, it is sufficient to send it by the ordinary conveyance, as by the first regular ship bound to that place, and it will not be an objection that it has not been sent by a ship bound elsewhere, but which accidentally touched at the place for which the notice was intended, before the arrival of the regular ship⁴.

A postmaster who kept separate boxes for letters for several parties, having, by mistake, put a letter notifying the dishonour of a bill into the wrong box, was found not liable for the loss, as notice might have been otherwise given⁵.

4. Proof of notice.

The burden of proving due notice always lies on the party suing for recourse, and the proof must be such as leaves no

got it, from writing to London, where the drawee lived, till the next post. Lord Ellenborough, at the trial, was of opinion, that the notice had been sent in sufficient time. But, the other Judges being of a different opinion, a rule was granted for a new trial.

¹ *Vide Darbishire v. Parker*, 476, note 5.

² This was ruled, under circumstances similar to those now stated, by Bayley, J., in *Bancroft v. Hall*, Holt, 476.

³ *Pearson v. Crallan*, 2 Smith, 404, *per* Lawrence, J., affirmed by the Court of King's Bench.

⁴ This was decided in *Muilman v. D'Eguino*, 2 H. Bl. 565.

⁵ *Hordern v. Dalton*, 1 C. and Pay. 181.

room for doubt or conjecture¹. It has been laid down², that notice may be instructed by the holder's oath; and a case is cited³, where it is said to have been held proveable by his oath or his letter-book. The former kind of proof could not now be admitted, as he would be thus made a witness in his own cause. But, the regular entry of a letter of notification in his letter-book would probably entitle him to prove, by his oath in supplement, or by the evidence of one witness, that it was transmitted on the date which it bears. In an English case⁴, regarding the transmission of a licence, it being proved to be the invariable course of the plaintiff's house, that the clerk who copied any licence sent it off by post, and made a marking on a copy of the licence that he had done so; and a copy of the licence in question being produced from the plaintiff's letter-book, in the handwriting of a deceased clerk, with a memorandum also by him bearing that he had sent it; this was held sufficient evidence, with the testimony of a person who knew the plaintiff's mode of doing business, that he had no doubt the licence was so sent. In another case⁵, it was held not sufficient, that the plaintiff had written a letter notifying dishonour to the defendant, which was put on a table where, by the usage of the house, post-letters were always deposited, and thence carried by the porter to the Post-office, as the porter was not called. But it was held, that it would have been enough if the porter had been called, and had said that he invariably put all letters deposited on the table into the Post-office, though he could not remember this letter. It was afterwards held, in the same case, to be sufficient *prima facie* evidence of notice, that the defendant, in a

¹ In *Lawson and another v. Sherwood*, 1 Stark. 314, where a witness proved merely, that a letter of notice had been sent two or three days after dishonour, without being able to specify the day, Lord Ellenborough refused to send such evidence to the jury, although it was urged, that the fact of the letter being sent in due time was presumable from its not being produced. But his Lordship held, that this merely let in parole proof as to the time of sending the letter, and that without such proof, no presumption could be received. The rule stated in the text, as to the *onus probandi* in questions of notice, is quite established in Scotland.

² Forbes, 98-9.

³ *Ewing v. Burnet*, 7th Jan. 1681, Forbes, 99.

⁴ *Hagendon v. Read*, 3 Campb. 379, *per* Lord Ellenborough.

⁵ *Hetherington v. Kemp*, 4 Campb. 193, *per* Lord Ellenborough.

letter to the plaintiff, acknowledged receipt of a letter from him of the same date with that in question, though without mentioning its contents. The defendant had had notice to produce the principal letter, and therefore, as he did not produce it, the presumption was, that it was a letter of notice. A similar rule, as to the effect of evidence of regularity of practice in putting letters of notice into the Post-office, was adopted in two recent Scotch cases¹, where the evidence of notice was found sufficient. In the last of these cases, there was a marking of intimation on the bill, and the letter of notice was entered in the letter-book; but these articles of evidence were wanting in the other case. It has been held, however, in England, not to be sufficient evidence of notice, that one of the holder's clerks deponed that the letter of notice was put into the Post-office on a certain day, but could not say whether this was done by himself or by another clerk². In another case, where the practice of the holder's office was, that a clerk, after copying letters into the letter-book, gave them to his master to seal, and afterwards, he or another clerk carried them to the Post-office; but there was no place of deposit in the office for such letters, and neither clerk could speak to the letter in question, though they swore that they carried to the Post-office all letters which were given them, it was held that an entry in the letter-book, of the letter in question, in the clerk's writing, could not be read as proof of the letter having been sent³. It has been also held, that, although evidence of the practice of a *public* office to leave letters in a box is admissible in a question of notice, such evidence as to the practice of a *private* office is inadmissible⁴.

In a case⁵, where it was proved, that on the day of the dishonour of a bill, the witness had, by the plaintiff's desire, compared two papers, one of which being produced, was a notice of dishonour, and that the witness had afterwards carried to the Post-office a letter from the plaintiff to the defendant, but

¹ Sandeman and Miller v. Thomson, 12th Nov. 1831, 10 S. D. B. 4; Robertson v. Gamack, 1st Dec. 1835, 14 S. D. B. 139.

² Hawkes v. Salter, 4 Bingh. 715; 1 M. and Pay. 750.

³ Toosey v. Williams, 1 M. and Malk. 129.

⁴ *Vide* case stated in Chitty, 647, note *a*.

⁵ Roberts v. Bradshaw, 1 Stark. 28.

of which he did not know the contents, this, with the proof of a notice to the defendant to produce this letter, was held to be sufficient evidence, since the defendant might have shewn, if he could, by producing the letter, that it was not a letter of notice.

A statement by the defendant to a third party, that he received a letter of notice too late, has been held no evidence of due notice, as the whole statement must be taken together, and proves that there was not due notice ¹.

As to the question, whether the defender should have notice to produce the principal letter of notice, in order to render secondary evidence of it admissible, the English authorities do not seem to be uniform. On the one hand, it has been held, that in this case, as well as in all cases of evidence regarding letters, notice must be given to produce the principal letter, as the best evidence, before secondary evidence can be received ²; and farther, that not only the fact of notice, but the date of sending it, is material in such a case, and that this might appear from the post-mark on the principal letter ³. On the other hand, it has been decided ⁴, that a witness might be allowed to prove that he had left a written notice at the defendant's house without notice to him to produce it; and also ⁵, that a paper bearing to be a notice of dishonour, and which was proved to have been compared, on the day of the dishonour of the bill, with another paper, might be read, without notice to the defendant to produce that paper. In a later case ⁶, the Court of Common Pleas, after consulting with the other Judges, decided, that a copy notice of dishonour made at the time may be given in evidence, without notice to produce the original. In this case, it was held, that a copy made

¹ *Braithwaite v. Colman*, 4 Nev. and Mann. 654.

² *Shaw and others v. Markham*, Peak's C. N. P. 165, *per* Lord Kenyon. In *France v. Lucy*, 1 R. and M. 341, Best, C. J., refused to allow parole evidence of the contents of such a letter of notification, on the ground that there had been only a notice to produce all letters relative to the bill, without specifying this letter.

³ *Langdon v. Hulls*, 5 Esp. 156, *per* Lord Ellenborough.

⁴ *Ackland v. Pearce*, 2 Campb. 600, *per* Le Blanc, J.

⁵ *Roberts v. Bradshaw*, 1 Stark. 29, *per* Lord Ellenborough. His Lordship's opinion in this case seems to be different from that which he expressed in *Langdon v. Hulls*, note 3.

⁶ *Kine v. Beaumont*, 7 Moore, 119.

at the time of writing the principal, and proved on oath, was equivalent to a duplicate original. Several of these later decisions appear to have been influenced by some peculiarity of the English law regarding all notices, *e. g.* notices to quit possession; it being held, that these may be proved without a requisition on the defendant to produce the principal notice, which rule has been applied also to notices of dishonour¹. Whether this rule, or the principle of the earlier cases, *viz.* that every thing possible should be done to procure the best evidence, before admitting secondary evidence, is most applicable in Scotland, cannot yet be determined. Our forms of proceeding hitherto have obviated any inconvenience arising from the production of secondary evidence first, because the other party has always an opportunity afterwards to produce the principal document. The question will not properly arise, till an attempt is made to lead such secondary evidence at a trial, without notice to the defendant to produce the principal letter, thus depriving him of all opportunity to disprove the secondary evidence. It may be doubted whether, in such a case, the pursuer or charger could be held to have done every thing in his power to procure the best evidence².

As notification is often made verbally, or by a card, which is not generally entered in a letter-book, it has been held, that a marking on the bill, by the cashier of the bank that held it, who was likewise one of their numerous partners, was sufficient to authorise a proof by his oath in supplement, that the notice had been sent³. In a case⁴, where it was proposed, but unsuccessfully, to prove, by the Treasurer and Secretary of the Bank of Scotland, who had likewise some shares of bank stock, that they had not got a letter of notice from a party of his retirement from a company, the Court, while they sustained the objection of interest, made an exception, on the authority of the foregoing case, in favour of such

¹ Compare *Ackland v. Pearce*, 2 Campb. 600, with *Jory v. Orchard*, 2 Bos. and Pull. 39, regarding the general law applicable to all notices.

² *Vide* cases in *Chitty*, p. 645, and particularly *Nauze v. Palmer*, 1 M. and M. 31, and *Affalo v. Fourdrinier*, 1 M. and M. 335, and 6 Bingh. 306, and *Bevans v. Waters*, 1 M. and M. 235, on points relative to those now discussed.

³ *Douglas, Heron and Co. v. Alexander*, 13th Feb. 1781, *Morr.* 1606.

⁴ *Padon v. Bank of Scotland*, 10th July 1824, 3 S. and D. 250, F. C.

evidence when brought to prove the dishonour of bills. In such a case, the party who makes the marking is the only witness who, from the nature of the transaction, can be adduced. In another case¹, where the cashier of a bank had got notice of the dishonour of a bill, and had himself given notice to another party, by reading or shewing him the letters which he had received, it was found, after a report from bankers as to the practice, that a notandum annexed by him to the letters, bearing that he had thus given notice, was sufficient to warrant his oath in supplement. In a later case², a copy of the letter of intimation, certified by the accountant of a bank, with a marking by him on the bill, bearing that it was sent, was held, when his testimony was lost, to be sufficiently confirmed by the evidence of another witness, who deponed that he saw the letter put into the Post-office, and the date marked on the bill.

A letter from the drawer of a bill to the holder, regretting that it was so long overdue, has been held to exclude the averment of want of notice³, and a letter from him, dated six days after notice should have been given, but implying that notice had been received, was held to prove that there was due notice⁴. It has been decided that the indorser of a bill who had paid it on two successive charges by the holder, was not bound, in an action of recourse against another indorser, founded on a letter of relief by him, to prove, at the

¹ *Colebrooke and Co. v. Douglas*, 18th July 1780, *Morr*, 1605, affirmed on appeal. The agent in this case was also an indorser of the bill, and, as such, would, in general, have been liable in recourse. But, from the tenor of the decision, he appears to have been considered as indorsing only in the character of the bank's agent, and, therefore, not to have been held personally liable to them in consequence of his indorsement.

² *Stewart v. Wright and Scott*, 13th Dec. 1821, 1 *Shaw*, 213. *Vide also Alexander v. Wood*, 20th Nov. 1735, *Elchies*, No. 8, *v. Bill*, being a question regarding notice of the dishonour of a bill to the granter of a letter of credit, in which the Court, while they held notice to be necessary, found that it was sufficiently proved by a note in the creditor's letter-book, bearing that it had been sent, corroborated by his oath in supplement, although no full copy of the notice was entered. In *Nelson v. Dinwoodie*, 26th Feb. 1830, 8 *S. D. B.* 605, where the Court held the evidence of the single witness adduced to be suspicious, they decided that notice was not proved.

³ *Mills v. Hamilton*, 1st Dec. 1830, 9 *S. D. B.* 111.

⁴ *Booth v. Jacobs*, 3 *Nev. and Mann.* 351.

distance of six years, that he had got notice, before making payment¹.

In all other respects, the proof of notice, whether verbal or written, appears to be subject to the rules established in Scotland as to parole or written evidence generally.

5. Time for giving notice.

1. Day when it should be given.

Although it is not necessary for the holder of a bill to present it till the term of payment, in which case, one protest, viz. for non-payment, and a notice of non-payment to the drawer and indorsers, will be sufficient, yet, if he does present it for acceptance, notice of non-acceptance must be given to the other parties as soon after acceptance is refused, as it is given, in the other case, after a refusal of payment². The neglect of this, however, if it does not appear *ex facie* of the bill, will afford only a personal objection against the party guilty of it, and cannot be pleaded against a third party who

¹ *Fraser v. Urquhart*, 11th June 1831, 9 S. D. B. 723.

² In *Goodal v. Dolley*, 1 T. R. 712, it was laid down, that if a bill is presented for acceptance, and acceptance refused, notice of non-acceptance must be immediately given, to preserve recourse. In *Blessard v. Hirst*, 5 Bur. 2670, the holder of an inland bill, which had been presented for acceptance and refused, was found to have lost his recourse by not giving notice of non-acceptance till after the term of payment. The same doctrine is laid down by Lord Ellenborough in *Orr v. Magennis*, 7 East. 362. In *Roscoe v. Hardy*, 2 Campb. 464, 12 East. 434, where the holder of a bill had given no notice to an indorser of its non-acceptance till after it had been likewise presented for payment, which was refused, his recourse was held to be thereby cut off, so that the indorser, who had, notwithstanding, paid the bill and taken a re-indorsement, was found to have done so in his own wrong, and could not have any claim against the other parties. In *Goostrey v. Mead*, Buller's N. P. 272, where non-acceptance had not been notified till after the term of payment, the holder's recourse was found to be cut off. But this decision was also given, at least partly, on account of the non-transmission of the protest. On this last point, *vide antea*, 447, note 2.

In Scotland, the principle, that it is necessary to notify the non-acceptance of a bill within a reasonable time after non-acceptance, was recognised, in *Miln v. Erskine*, 10th Feb. 1710, Morr. 1551, though the precise time of intimation was not then precisely fixed; the Court having found, that the holder's recourse against the drawer was cut off, "by his not having advised the drawer that his bill was refused to be accepted, for the space of five or six months after protesting for non-acceptance." The same rule is also implied in *Forbes*, 97, with reference to the non-acceptance as well as the non-payment of bills. It does not seem to have been ever disputed in modern times.

takes the bill *bona fide* before the term of payment, and himself duly negotiates it¹.

It is now to be considered within what time, after non-acceptance or non-payment, notice of either ought to be given. In Scotland there are different rules on this subject as to foreign and inland bills.

The rule as to foreign bills depends, both in Scotland and England, on the custom of merchants², and, when expressed in general terms, is, that notice of refusal to accept or pay must be given within a reasonable time after refusal. What is a reasonable time depends a good deal on the circumstances of each case. In England, it has been held, though the point has excited much discussion, that these circumstances, such as the distance of the parties from each other, the course of post, and, in short, all facts touching the question of notice, ought to be left to the jury; but that, when they have been found, the inference to be drawn from them, as to the reasonableness of the time within which notice has been given, is a question for the Court³. In Scotland, as well as in England⁴, there appears to have been at first no definite rule as to the proper time for giving notice, as may be inferred from the fact, that it was pleaded, in one case⁵, to be due negotiation of a bill protested in September, to no-

¹ O'Keefe v. Dunn, *ante*, 287, note 2.

² As to Scotland, the act 12 Geo. III. c. 72, while it establishes a peculiar rule, to be afterwards stated, as to the time for notifying the dishonour of inland bills, does so, "without prejudice to the notification of the dishonour of foreign bills, to be made within such time as is required by the usage and custom of merchants."

³ Chitty, 509-10; and *per* Lord Mansfield in *Tindal v. Brown*, 1 T. R. 167. Ashurst and Buller, *contra*, held the reasonableness of notice to be altogether a question of law. In *Darbishire v. Parker*, 5 East. 12-13, Lord Ellenborough and Grose, J., appear to have considered this as a question compounded of law and fact; Lawrence and Le Blanc, J., held it to be a question of law. In *Bateman v. Joseph*, 12 East. 433, and *Browning v. Kinnear*, Goiv. 81, the question, whether proper diligence had been used in searching for the residence of the person who was to get notice, was held to be proper for the jury. In *Scott v. Lifford*, 9 East. 347, Grose, J., says, that "due diligence" is a question of law, but judges may take the opinion of a jury as to what is convenient in the manner of giving notice." For other cases on this subject, *vide* Chitty, 510, *b*.

⁴ Chitty, 510, note *b*, and cases therein cited.

⁵ *Ferguson v. Malcolm*, 12th July 1729, *Morr. 1559*.

tify its dishonour in April following; and in another case¹, where a bill had been protested on 2d June, that it was sufficient to notify its dishonour in December following; for, although recourse was held to be cut off in both these cases, the mere statement of such pleas shews, that there was then no fixed rule as to the time of notification. It has been laid down more recently², that the dishonour of bills ought to be notified within three posts after it takes place; and the statement implies that such notification would be sufficient. This opinion was recognised as the ground of decision in a case³, where the Court, holding the rule with regard to foreign bills to be, that their dishonour should be notified within three posts, decided, on that ground, that notification on the fifth day was insufficient to preserve recourse. But that opinion has been since judicially held erroneous⁴, and is now disregarded. There does not appear to have been any express decision since in Scotland, as to the time for intimating the dishonour of foreign bills, although the Court⁵ is said to have expressed an opinion that notice ought to be given by the *first* post. In the absence of Scotch decisions, those pronounced in England, as they proceed on the same principles which we recognise, deserve attention. 1. It appears to be settled, both in Scotland and England, that, if the drawee refuses payment on the bill being presented to him at any period of the last day of grace, its dishonour *may* be notified on that day⁶. 2. If all

¹ *Adam v. Dick*, 24th Feb. 1737, *Morr.* 1563, *Elchies, v. Bill*, No. 15, where the bill is said to have been protested seventeen days after the term of payment.

² *Ersk.* iii. 2. 33.

³ *Reynolds v. Syme and others*, 4th Feb. 1774, *Morr.* 1598.

⁴ *Vide* the opinion expressed by the Court in *Carrick v. Harper*, 23d May 1790, *Morr.* 1614.

⁵ *Ibid.*

⁶ *Antea*, 378-9, and cases therein cited, which prove that a protest may be taken under the circumstances stated in the text, and, consequently, that it is equally competent, under these circumstances, to give notice. The same doctrine was expressly held with regard to notice by the Lord Chancellor, in *Moline ex parte*, 19 Ves. 216. In *Hartley v. Case*, 1 C. and Pay. 555, where, on presentment of a bill at the place of payment, the answer was, that it could not be paid then, but that there would probably be effects to pay it in the course of the day, it was held by Abbott, C. J., that notice sent to the indorser immediately on this answer was good or bad, according as the acceptor paid or did not pay the bill. The notice was held by the whole Court to be insufficient on another ground, 4 B. and Cr. 339, 6 D. and Ryl. 505.

parties live in the same place, each party has a day to give notice to the person immediately before him on the bill. This rule has been settled in England, after much discussion, on the strongest grounds of expediency; it being held unreasonable that a party in business should be obliged to lay aside all his other business, to notify the dishonour of a particular bill at the earliest moment¹. But it is required, in such a case, that the letter of notice should be put into the Post-office before the second day's post goes out, so that it may reach the person to whom it is addressed by that post². 3. Each indorser has a day after receiving notice, but under the limitation now mentioned, to give notice to the preceding indorser³. If, however, any one of them delays more than a day to give notice to his indorser, he will be considered guilty of laches, and cannot plead in excuse, that, by other indorsers taking less than a day, there was not more time consumed on the whole than would afford a day to each⁴. Moreover, *the*

¹ *Per* Lord Ellenborough in *Darbishire v. Parker*, 5 East. 9, where his Lordship lays down nearly the doctrine in the text. In *Smith v. Mullett*, 2 Camp. 208, and *Marsh v. Maxwell*, mentioned in a note to that case, his Lordship acted on the same doctrine. In *Scott v. Lifford*, 1 Campb. 246, 9 East. 347, where a bill was presented for payment on 4th June, returned to the plaintiff dishonoured on the morning of the 5th, and the latter put a letter of notice for the defendants into the twopenny post on the 6th, the jury, on these facts being left to them by Lord Ellenborough, to determine whether there had been sufficient diligence, found for the plaintiff, and a rule nisi for a new trial was refused. The foregoing doctrine was also recognised in *Hilton v. Shephard*, 6 East. 14, and was laid down by Lawrence, J., in *Hilton v. Fairclough*, 2 Campb. 633, and in *Jameson v. Swinton*, 2 Campb. 373. In *Fowler v. Hendon*, 4 Tyrwh. 1002, where a plaintiff was bound to have given notice, so that it should reach the defender on 7th November, it was held not enough that he put a letter of notice into the twopenny Post-office on that day, without also proving that it reached the defendant that day. *Vide* also *Poole v. Dicus*, 1 Bingh. N. S. 649.

² This was held by Lord Ellenborough in *Smith v. Mullett*, note 1, where the plaintiff, though he got notice of the dishonour of a bill on Monday, did not send off a letter of notice to the preceding indorser, who also lived in London, till after post hours on Tuesday, so that the indorser did not get it till Wednesday. He was held to be guilty of laches, and was non-suited.

³ This was held by Lawrence, J., in *Jameson v. Swinton*, note 1. The same rule seems to have been also adopted in a recent Scotch case, *Clarkson v. Ball*, 17th Nov. 1831, 10 S. D. B. 17.

⁴ In *Marsh v. Maxwell*, note 1, Lord Ellenborough said, "It is not enough that the drawer and indorsers received notice in as many days as there are subsequent indorseees, unless it is shewn that each indorsee gave notice

holder giving notice to the first or any prior indorser, must give it to him in a day, as well as to the last indorser¹. In the case, however², of a shipmaster, who had drawn a bill on his employers, as their agent, for the price of a cargo of wood which he had bought for them, they having refused to accept or pay without notice to him, and he being arrested for it abroad, several years afterwards, and having paid it, he was found entitled to claim indemnity from them, though he did not prove that the dishonour of the bill had been notified to him, it being held, that, as he was identified with them as their agent, or, if not, as he drew without authority, it was doubtful, in either case, whether he was entitled to notice, or, though he were, that they were to blame, for not having intimated to him their non-acceptance, or told him what he should do if the bill was claimed from him. 4. When the parties reside in different places, as well as when they reside in the same place, it will be sufficient if a party gives notice, by the post of the day following that on which he receives it, or on which he is otherwise aware of the dishonour; it being held, as in the case of parties residing in the same place, that he is not bound to neglect all his other affairs, in order to give notice by the first post³. It seems to have been held at one

"within a day after receiving it, as, if any one has been beyond the day, the drawer and prior indorsers are discharged." The same rule was enforced in *Smith v. Mullet*, 486, note 1, although the defendant, from two of the indorsers having given notice to the parties immediately before them in one day, had received notice in a shorter time on the whole than would have been required, if each indorser had taken a day after receiving notice. In *Turner v. Leach*, 4 B. and A. 451, where an indorser, who got notice on the 4th of September, did not give it till the 8th, (having left town on the 1st and not returned till the 8th, on account of his wife's illness, which, however, was held to be no excuse, as he ought to have had some person to attend to his business,) it was found to be no defence by him against his indorser, that the same time would have elapsed, if each of the intervening indorsers had taken a day to give notice, it being held that *his party* was discharged simply by *his own* neglect to give due notice, without reference to the other parties.

¹ *Dobree v. Eastwood*, 3 C. and Pay. 250.

² *Huntly v. Sanderson*, 1 Cr. and Meas, 466.

³ In *Darbishire v. Parker*, 6 East. 12-13, it was held, that a party who got notice by post on the 12th, would have used sufficient diligence if he had sent notice to another party by the post of the 13th. But the Court did not, in that case, lay down a general rule, whether notice ought to be sent, in all cases,

time, that in such a case notice should be sent, if practicable, by the first post; and that this could not be dispensed with, unless the post sets out so early after the notice arrives as to render it impracticable¹. But the obvious inexpediency of inquiring, in each, whether this was practicable from the party's occupations, or other causes, has led in England to the establishment of the foregoing rule. It would probably be fol-

by the next post, or by next day's post. Lawrence, J., holds the first of these doctrines to be the rule, unless the post goes out very soon after the notice is received. But in *Williams v. Smith*, 2 B. and A. 496, Abbott, C. J., in giving the opinion of the King's Bench, lays it down that the time for giving notice is "the departure of the post on the day following that in which the party receives intelligence of the dishonour." In the previous case of *Bray v. Hadwen*, 5 M. and S. 58, where a party who got notice by post about half-past 8 A. M., had, instead of sending notice to another party by that day's post, which set off at 12 noon, delayed it till next day's post, the Court of King's Bench, *per* Lord Ellenborough, held it to be fixed since *Darbishire v. Parker*, and constantly recognised at Guildhall, that each party had a day to give notice, and the plaintiff was therefore found to have given due notice. In *Wright v. Shawcross*, 2 B. and A. 501, note, the same principle was recognised, it being held sufficient for a party who had got notice on Monday morning to send it to another party by the Tuesday's post. In a subsequent case, *Hawkes v. Salter*, 4 Bingh. 715, it was held sufficient to have given notice by the Tuesday morning's post of the dishonour of a bill payable on Saturday, as the post went in the morning, seeing it was *contra bonos mores* to write on Sunday, and the holder was not bound to get up at an unseasonable hour on Monday morning to write in time for that post. But there was no sufficient proof that the letter had been sent even by the Tuesday's post, and therefore a new trial was allowed, on payment of costs, (a verdict having been given for the plaintiff, subject to a reservation of the objection.) In the case of a check presented to a banker by a customer, with directions to place it to his account, the banker, on resolving to return it, was held exonerated by giving notice by letter next day; *Boyd v. Emmerson*, 2 Ad. and Ell. 184, 4 Nev. and Mann. 99. In another case, *Geill v. Jeremy*, 1 M. and Malk. 61, the holder was not held bound to send notice by the first post, though, in consequence of there being no post on the day following, the notice was thus not sent till the third day. In *Day v. Slater*, 4 C. and Pay. 200, a bill belonging to bankers in Paris, being dishonoured in London, it was held, 1st, That their London correspondents were entitled to send it to them; but, 2dly, That, when it was returned, one of them, being then in London, was not entitled to give it back to the London house, but should have sent it directly to the drawer.

¹ *Per* Lawrence, J., in *Darbishire v. Parker*, 6 East. 10-11. Malynes, B. 3, C. 6, Obs. 1, and Marius, 97, had previously laid it down, that notice ought to be sent off by the first post. In *Carrick v. Harper*, 23d May 1790, Morr. 1614, it is laid down, probably on the authority of Marius, to be the rule in England, that notice should be given by the first post, though circumstances might justify a longer delay.

lowed in Scotland. It has been held ¹, to be no objection to notice, that it has been sent by other means than the post, if it arrives on the same day that it would have done by post. When there is no post, notice should be sent by the first regular conveyance ²; and, if there is none, it may be sent by express ³. 5. The rule which has been stated as to parties living in the same place, viz. that each party has a day for sending notice after he receives it, applies also where they live in different places ⁴. In both cases, where a banker is employed to recover payment, an additional day is allowed for him, besides the parties to the bill or note, the employment of a banker being a recognised mode of recovering payment ⁵. 6. If the day after that on which the party concerned

¹ *Bancroft v. Hall*, *antea*, 477, note 2.

² *Muilman v. D'Eguino*, *ibid.* note 4.

³ *Pearson v. Crallan*, *ibid.* note 3.

⁴ *Bray v. Hadwen*, and *Williams v. Smith*, *antea*, 487, note 3, both imply this doctrine.

⁵ In *Haynes v. Birks*, 3 Bos. and Pull. 599, where the plaintiff's banker, with whom he had lodged the bill to recover payment, heard of its dishonour only betwixt nine and ten on Saturday evening, and on Monday sent notice to the plaintiff, who gave notice to the defendants on Tuesday, Lord Alvanley, C. J., though he allowed that a banker was not to be considered as the same person with his constituent with reference to notice, (otherwise there would be an end to the employment of bankers in such matters,) laid it down, that a banker was bound to notify the dishonour to his constituent the very day that he got notice, if he could do so by using ordinary diligence. But an opposite doctrine has been since established. In *Scott v. Lifford*, 9 East. 347, where a bill had been deposited in the hands of bankers, they, as well as the other parties, were allowed a day after they had heard of the dishonour, to notify it to their constituents. Afterwards, in *Robson v. Bennett*, 2 Taunt. 388, it was recognised as allowable for a party receiving a check in payment of goods, to lodge it with his bankers to recover the amount, though the effect was to delay the negotiation of it, and consequently the notice of its dishonour to the defendants, (the drawers,) for one day longer than it would have been otherwise delayed. In *Langdale v. Trimmer*, 15 East. 291, where a day had been also lost in the negotiation of a bill, by the plaintiff giving it to his bankers to get payment, instead of presenting it himself, it was held by the Court of King's Bench, (whose opinion was expressed by Lord Ellenborough,) that the bankers were to be considered as distinct holders, not as identified with their customers, and that the plaintiffs were entitled to take a day after the bill was returned by the bankers, before giving notice. In *Bray v. Hadwen*, *antea*, 487, note 3, where country bankers, with whom a bill had been lodged to get payment, though they got notice from London of its dishonour on 18th July, sent notice only by the post of the 19th, it was held by the Court of King's Bench, that each party, such bankers not excepted, was entitled to take a day for giving notice.

gets notice falls on a Sunday, or any day when he is forbidden by his religion from attending to secular affairs, it has been held that he is not bound to send notice till the following day¹. By a recent statute already referred to², 7 and 8 G. IV. c. 15, § 1-4, it is enacted, that, in the event of a bill or note falling due on a day before a public fast or thanksgiving, or the day before Christmas day or Good Friday, notice of its dishonour shall be sufficient, if sent the day after these days, or, in the event of their falling on a Saturday, if sent on the Tuesday following. But this enactment is declared not to extend to Scotland.

2. Time of day for notice.

As to the time of day for giving notice, the same doctrine seems applicable which has been explained as to presentment³, viz. that notice to a banker, or any person in business, will be valid only when given in the usual hours of business⁴, but that to another person, it may be given at any reasonable time of day or night, excluding the proper hours of rest.

The foregoing illustrations from the law of England have been selected chiefly from cases of inland bills, because the rule with them, as to the principal sum, as well as with foreign

¹ In *Haynes v. Birks*, 3 Bos. and Pull. 599, where the banker with whom a bill was lodged to recover payment did not hear of its dishonour till late on Saturday night, it was taken for granted that he was not bound to do any thing in consequence till Monday. The same doctrine was implied in *Bray v. Hadwen*, 5 M. and S. 68, and in *Wright v. Shawcross*, 4 B. and A. 501, note, where it was found that a party who got a letter of notice on Sunday was not bound to open it till Monday, or to send notice to another party till Tuesday. In *Lindo v. Unsworth*, 2 Campb. 602, where the bankers with whom a bill was, had sent to notify its dishonour to the plaintiff on 8th October, but found his counting-house shut, (he being a Jew, and the 8th being a great Jewish festival,) so that he did not get notice till that day's post was gone, or give notice to the defendant till the post of the 9th, Lord Ellenborough held, that he was excused by his religion from attending to secular business on the 8th, and was not therefore bound to give notice till the next day.

² *Antea*, 451.

³ *Antea*, 414, and 436-7.

⁴ In *Bancroft v. Hall*, *antea*, 477, note 2, delay of notice was held to be excused by the circumstance of the person sent to give it having found the defendant's place of business shut during business hours. In *Crosse v. Smith*, *antea*, 474, note 1, it was held to be sufficient notice to a merchant to send a clerk to his counting-house to give notice betwixt 10 and 11 A. M., although no notice was given, as the counting-house was shut.

bills, is, that to preserve recourse, notice must be given within a reasonable time; so that English cases as to inland bills depend on the principles which regulate the law of Scotland as to foreign bills¹.

3. Time for notice on inland bills in Scotland.

In Scotland, the time for giving notice on inland bills and promissory-notes depends on different rules from those which have been stated regarding foreign bills, being regulated by the 12 Geo. III. c. 72, § 41, now made perpetual, which enacts, "that it shall be sufficient to preserve the said "recourse" (on inland bills and promissory-notes,) "if notice is given of the dishonour within fourteen days after the "protest is taken." It was probably the design of this enactment to establish the same rule regarding notice on inland bills in Scotland as in England. But the framers of the act seem to have supposed that fourteen days' notice was sufficient in England to preserve recourse *on the bill*, whereas the English rule on that subject relates only to notice of the *protest*, notice *on the bill* being regulated like notice on foreign bills. The notice, therefore, which is required in Scotland regarding the dishonour of inland bills and promissory-notes depends on a statutory rule, which has no analogy either to our own law regarding foreign bills, or to the law of England². This rule is not applicable either to bills drawn in Scotland and accepted and made payable in England, or *vice versa*, such bills being accounted foreign bills³.

It has been decided, agreeably to this statute, that notice is effectual, though not given to the drawer or several of the indorsers for twelve days after the dishonour of the bill,

¹ The 9 and 10 Will. III. c. 17, § 1, and 3 and 4 Anne, c. 9, § 5, authorise a protest in England on inland bills, for the purposes already mentioned, *antea*, 443, and require that *such protest* shall be notified within fourteen days after being made. But, independently of all question about the protest, the claim for the amount of the bill cannot be preserved without reasonable notice, which notice, as stated in the text, depends on the same principles as with regard to foreign bills.

² 1 Bell, 418-19.

³ This was held in *Reynolds v. Syme*, 4th Feb. 1774, Morr. 1598, and *Ferguson and Co. v. Belah*, 17th June 1803, Morr. App. 16, with regard to bills drawn in Scotland, and accepted and made payable in England; and the same doctrine evidently holds as to bills drawn in England upon and made payable in Scotland.

having been given only to one of the indorsers when the bill was dishonoured¹.

There are two questions under this act, viz. 1st, Whether intimation within fourteen days must be made by the holder to every party against whom he wishes to preserve recourse? and, 2dly, Whether intimation made to an indorser on the last of the fourteen days, so that he cannot give notice within that period to any preceding indorser, will notwithstanding preserve recourse against *him*. These questions shall be discussed when we consider by and to whom notice ought to be given.

6. Place for giving notice.

As to the place where notice of the dishonour of bills or notes should be given, or to which a letter of notice should be addressed, the same rules appear to be applicable as with regard to the place of presentment². It has been explained³, that due diligence ought to be used to find out the drawee's residence, in order to present the bill; and the same diligence is necessary to find out the drawer or indorser's residence, in order to give him notice. It has been considered⁴ as sufficient diligence, to inquire at the last indorser, and the last but one, for the drawer's residence, in order to give notice to him, the day after the bill became due; and on the latter of these persons, who alone could give information, not being at home, to call back next morning, when information was got, and notice of dishonour immediately given. In the case of a promissory-note, it has been held sufficient to inquire at the maker's house for the payee's residence⁵. But, it has been considered not sufficient to inquire for an indorser's residence merely at the place where the bill was payable, without asking at any of the parties to the bill, or searching for persons of the same name in the Directory⁶. If the drawer has left no notice at his last place of residence where he is to be found, and the holders of the bill have made inquiry after him at the person through whose request they advanced money on the

¹ Baird v. Belch, 9th July 1803, stated by Mr Bell, 1, 419, note 1.

² *Antea*, 415-16-18, &c.

³ *Ibid*.

⁴ Browning v. Kinnear, Gow, 82, per Dallas, C. J., confirmed by the verdict of a jury.

⁵ Sturges v. Derrick, Wightw. 76.

⁶ Beveridge v. Burgess, 3 Camp. 262, per Lord Ellenborough.

bill, they will be excused for the delay of notification occasioned by their not finding him ¹. In a case ², where a party, not knowing the address of the immediately preceding indorsers, wrote to inquire about it at his brother, who had taken the bill, and some delay occurred before he could get an answer, it was decided, that the indorsers were not thereby discharged, as all due diligence had been used, and as there had been no unnecessary delay in giving notice. A similar decision was given more recently ³, where the bill-holder asked for the residence of the defendant, (an indorser,) at a party, (his brother-in-law,) who had signed his name by his authority, but got no information, and afterwards not only notified the dishonour to him, but, *1st*, directed his attorney to give due notice, in consequence of which a letter was sent to the defendant, addressed to the place where the bill was dated; and, *2dly*, Having desired the attorney to use due diligence to find out his residence, the latter found it out on 16th October, (more than two months after the bill became due,) and, after consulting the plaintiff, notice was sent on 18th October. The Court of King's Bench, in this case, held, *1st*, That notice to the defendant's brother-in-law (who had acted as his agent) was notice to him; *2dly*, That due diligence had been used; *3dly*, That the plaintiff's attorney was entitled to a day in order to consult the plaintiff, after getting information as to the defendant's residence, and that, therefore, the notice was in sufficient time on 18th October, as he was entitled, besides, to a day for giving notice, after he got the information on the 16th. A statement by an indorsee, in a letter, that he did not know the drawer's residence "till within these few days," has been held not to imply that he had learned it sooner than the day before ⁴.

If the drawer of a bill calls at the holder's counting-house before the term of payment, and says that it will not be paid, and that he has no fixed residence, but will call again and see whether it is paid, the holder will not be bound to seek after

¹ *Hodgson and Donaldson v. Bushby*, 18th July, 2d Dec. 1782, *Morr.* 1609, as reversed in the House of Lords.

² *Baldwin v. Richardson*, 1 B. and Cr. 245; 2 D. and R. 285.

³ *Firth v. Thrush*, 8 B. and Cr. 387.

⁴ *Kirby v. England*, 2 C. and P. 300.

him, but he will be held to have taken the burden of inquiry on himself¹. The holder will not be excused, if a letter of notification has failed to reach the party in time, through a mistake in the address².

7. Notice—by whom?

By what party notice must be given, to preserve the holder's recourse against the party receiving it, has been much discussed, and is not yet satisfactorily settled. The chief purpose of notice is, that the party receiving it may secure his relief from the parties liable to him against the claim made upon him under the bill or note; and, therefore, such notice, if it does not state, must at least afford him reason to believe that a claim will be made against him. But his belief of this must depend much on the party from whom the notice proceeds. His mere knowledge that the bill or note has not been accepted or paid affords no ground for such a belief; because it does not thence follow that the holder will resort to him for payment. Information, therefore, of non-acceptance or non-payment by a stranger, who has no concern with the bill or note, and does not act for any party to it, is not equivalent to notice, as it amounts to no more than the casual knowledge now mentioned³. In one case, indeed, in Scotland⁴, private knowledge seems to have been admitted at least as an element

¹ *Philpson v. Kneller*, 4 Campb. 285, 1 Stark. 116, *per* Lord Ellenborough.

² *Eisdale v. Sowerby*, 11 East. 114, where the delay in giving notice arose from sending the bill, after it was dishonoured, to a bank at Birmingham, instead of a bank at Liverpool. In the Scotch case of *Henderson v. Duthie*, 19th Jan. 1799, *Morr.* App. 9, it was held to be a good excuse for a party not notifying the dishonour of a bill, that he himself had not got notice in time from the bank for which he was agent, as the letter to him was miscarried. From the address being rather indefinite, the letter had been sent to another person of the same name; and it may therefore be doubted whether the bank should not have suffered for this consequence of neglect in the address. But there was no mistake in the address, it being correct so far as it went.

³ In *Mackenzie v. Urquhart*, Jan. Feb. 1731, *Morr.* 1561, the Court held it "irrelevant to state that the drawer had heard of the dishonour of the bill by means of third parties, since he was to rely upon notification only from the "porteur himself or his order." In the *Stirling Banking Company v. Duncan's Representatives*, 20th Feb. 1784, *Morr.* 1611, the Court expressed an opinion, that mere knowledge of the dishonour of a bill was not equivalent to notice.

⁴ *Irvine v. ———* 1791, *Morr.* 1617, *Bell's Cases*, 120.

of notice. But, in that case¹, "there was that sort of intercourse among the parties, which left it to be inferred that the indorser was aware not merely of the dishonour, but of the holder looking to him for payment; particularly, there was a meeting of the parties, at which the acceptor made a partial payment." This last circumstance shewed that the holder was *in cursu* of enforcing payment from the acceptor; and, as the defender seems to have been a party to this payment, he must, from it, as from other circumstances, have been convinced, that he would be called on for payment, failing the acceptor. Supposing, therefore, that this case were a fit precedent, which has been doubted², it cannot impeach the rule, that information by a stranger, or, in other words, mere casual knowledge, is not equivalent to notice³. But, if the drawer or indorser gets information, whether from the holder or not, which certiorates him that the latter intends to claim recourse from him, the purpose of notice, viz. to enable him to take measures for his security, is answered. This is the only principle which appears capable of supporting the

¹ 1 Bell, 421, note 2.

² *Vide* Mr Bell's remarks on it, in the passage cited note 1.

³ *Vide* remarks on this subject in *Tindal v. Brown*, 1 T. R. 167. There are two cases illustrative of the same principle, *Nicholson v. Gouthit*, 2 H. Bl. 612, and *Whitefield v. Savage*, 2 Bos. and Pull. 277, in both of which recourse was denied for want of notice, although the party claiming it knew, before the term of payment, that the acceptor of the bill, in the one case, and the granter of the note in the other, could not pay it, being insolvent. In *Stewart v. Kennett*, 2 Camp. 177, where a person who had been employed by the original parties to a bill to get it discounted notified its dishonour to the defendant, and told him where it was lying, (he having then no connection with any of the parties,) Lord Ellenborough held, that this information could not be pleaded as notice by the holder, though it might if the witness had been his agent; and farther laid down, that "notice must come from the person who can give the drawer or indorser his remedy on the bill, otherwise it is merely an historical fact."

There is one case, *Brett v. Levett*, 13 East. 213, where it was allowed to be proved, in order to account for the want of notice, that the drawer, on the day on which he committed an act of bankruptcy, being asked by the holder whether the bill would be paid, answered, "No, that it would come back." The question, however, seems to have turned on the competency of admitting evidence as to any declaration on the subject, made by the drawer *after his bankruptcy*. Nothing is said regarding the effect of this declaration, either as equivalent to notice, or as amounting to a waiver of it. It does not appear to have been either the one or the other.

decision last cited ¹. The same doctrine may perhaps have been in view in another case ², where evidence was admitted to prove that the drawer had expressed his belief to the holder that the bill would be returned unpaid ; but such an expression of belief *before the bill was due*, would not probably be held equivalent to a subsequent certainty, either that the bill was not paid, or that the holder claimed recourse. It has been held at *Nisi Prius* ³, to be proof of the drawer having got notice, that he intimated to the holder, that he would defend any action on the bill, as he had been defrauded, but did not then allege want of notice.

The English courts seem to have at first too much narrowed the limits of notice. In one case ⁴, opinions are expressed, that notice ought to be given in all cases by the holder. But the only point as to notice then before the Court was, whether a request by the *granter* of a note to the defendant to take it up was equivalent to notice by the holder ; and the Court may probably have been thus led to lay it down, that, *in that case*, notice could proceed only from the holder, without advertg to the other question of the validity of notice by an indorser. The case was decided on another ground. But the opinion now referred to was followed afterwards by an eminent authority ⁵, who, after citing the opinion of Mr Justice Buller, as importing that effectual notice could only come from the holder, and stating that it had been frequently acted on since, decided, on that ground, that notice by the indorser of a bill could not be available to the holder. But this doctrine seems not to be consistent with the principles which have been since established. 1st, It appears to be settled, that notice by an indorser to the drawer, or a prior indorser of a bill or note, will enure to the benefit of any intervening party ⁶. No intervening party can have a claim against the drawer or prior indorser, without paying to the

¹ 1 Bell, 421.

² Brett v. Levett, 495, note 3.

³ Wilkins v. Jadis, 2 M. and Malk. 41.

⁴ By the Court of King's Bench, in Tindal v. Brown, 1 T. R. 167.

⁵ Per Lord Chancellor Eldon, in *ex parte Barclay*, 7 Ves. 597. It is remarked in Selwyn's *Nisi Prius*, 333, note 25, that, when his Lordship pronounced this judgment, he was not aware of Lord Kenyon's opinion to the contrary in *Shaw v. Croft*, of which *post*.

⁶ Bayley, 255.

party who gave notice, and by doing so, he acquires all his rights, and, among others, the benefit of the notice given by him. As it may not be certain, however, whether the holder has given notice to all the prior parties, it is prudent in any indorser from whom payment is demanded, to give notice, as soon as he gets it, to all the previous parties, in order to secure his recourse against them¹. For, if he has got notice, it will not afford him any defence, that the holder has not given notice to the previous parties, from whom he himself is entitled to claim recourse². *2dly*, Although the holder of a bill or note should give notice only to his immediate indorser, he may avail himself of notice to any prior party, whether it proceeds from his indorser, or from some earlier indorser to whom the latter has given notice. This rule is conformable with the purpose of giving notice, as the party receiving it is put sufficiently on his guard, if it comes from any person who has a right to exact, and intends to exact payment, and that, whether payment is exacted by that party under his right of recourse, or by the holder. Accordingly, it has been decided in two cases³, where actions were brought by the last indorsee against the drawer, that notice to a drawer or indorser by the plaintiff's indorser was available to the plaintiff, being held sufficient to "serve all the purposes for which notice is required," seeing the drawer or indorser was thus enabled "to take it up if he pleases, and he may immediately proceed against the acceptor or prior indorsers." In a later case⁴, it was decided by the Court of King's Bench, on a review of all previous decisions, that the holder of a bill may avail himself of notice given by any person who is a party to it. The law may, therefore, be now considered as settled.

¹ Bayley, 255.

² *Edwards v. Dick*, 4 B. and A. 212. In this case, the bill was accepted payable at a particular place; and, in an action against the drawer, he objected that non-payment had not been notified to the acceptor. Even the latter would not have been entitled to urge such an objection, as an acceptor is not entitled to notice. But, at all events, the plea was held to be *ius tertii* to the drawer, because he had got notice.

³ *Per* Lawrence, J., in *Jameson v. Swinton*, 2 Camp. 373, and *per* Lord Ellenborough in *Wilson v. Swabey*, 1 Starkie, 34, part 2; *vide* also Bayley, 254.

⁴ *Chapman v. Keane*, 4 Nev. and Mann. 607.

3dly, It has been much discussed, whether notice of dishonour by the acceptor of a bill, or granter of a note, preserves the holder's recourse against the party receiving notice. In a case¹, where the granter of a note had told the defendant, an indorser, after the term of payment, that he could not pay it, and asked the defendant to pay it, the Court of King's Bench held that the plaintiff, an indorsee, could not found on this as effectual notice. In another case², where the acceptor of a bill had informed the drawer, before it became due, that he could not pay it, and the drawer had, in consequence, agreed to pay it, it was held that this could not be considered, in an action against the drawer, as notice available to the plaintiff, an indorsee. Again³, where the acceptor, before a bill became due, had told the drawer that he could not pay it, but gave him five guineas in part, on taking which the drawer promised to retire the bill, this was found, in an action by an indorsee against the drawer, not to be equivalent to notice, though the plaintiff was held entitled to the five guineas, as given to the defendant for his use. On the other hand, in an action⁴ by the holder against the drawer, where it appeared that the acceptor had left a message at the drawer's house that the bill was dishonoured, this was accounted sufficient notice; it being held that "it made no difference who apprised the drawer, *since the object of the notice was, that the drawer might have recourse to the acceptor.*" Afterwards⁵, in another action by the indorsees against the drawer, where it appeared, that after the bill had been presented and dishonoured, the acceptor wrote a letter to the drawer mentioning the dishonour, and stating that the bill was in the hands of the plaintiffs, this was held to be sufficient notice. There does not appear, notwithstanding the conjecture to that purpose by a learned author⁶, to be any evidence that the acceptor acted in this case as the plaintiffs' agent. But there is a distinction between these cases where the acceptor's intimation was held equivalent to

¹ Tindal v. Brown, *ante*, 432, note 4.

² Staples v. Okines, 1 Esp. 352, *per* Lord Kenyon.

³ Baker v. Birch, 3 Campb. 107, *per* Lord Ellenborough.

⁴ Shaw v. Croft, *per* Lord Kenyon, Chitty, 527, note d.

⁵ Rosher v. Kieran, 4 Campb. 87, *per* Lord Ellenborough.

⁶ Bayley, 254-5.

notice, and the previous cases where it was not. In the latter, (if we except the first ¹, where a degree of strictness was followed with regard to notice which would not now be adopted,) the acceptor merely stated, *before* the bill became due, that he would not be able to pay it; but the drawer had no notice even from the acceptor, *after* it fell due, which could lead him to believe that the holder had presented it, or looked to him for payment. In the other cases, the acceptor, after the term of payment, *expressly notified its dishonour*, so that the drawer was both warned of the probability of payment being demanded from him, as it had been demanded from the acceptor, and was enabled to take measures for his indemnity as if the holder or some indorser had given him notice. The principle of these decisions appears to be, that such notice gives a party as much reason to expect and provide against recourse, as if the holder or some person entitled to recourse had given him notice, and this is the more natural, as notice merely reminds parties of an obligation to which they are previously liable. It may therefore, perhaps, be held, that notice of non-payment by the acceptor or granter, after payment has been demanded, is as effectual as by the holder or an indorser.

It is obviously expedient that a verbal notice should be given, not by the holder in person, but by some third party, that he may be competent to prove it ².

8. Notice—to whom?

Notice must be given to all parties from whom the holder intends to claim recourse ³. But it is not necessary to the acceptor of a bill, or maker of a note, because they are liable, at all events, as primary debtors, and as they have no recourse against the other parties, cannot derive any benefit from notice.

¹ Tindal v. Brown, 432, note 4.

² Chitty, 528.

³ This point was fully discussed in Scotland, in Elliot v. Bell, 14th Feb. 1781, Morr. 1606, where it was decided, in conformity with a report from Sir Robert Herries, an eminent merchant, that the holder of a promissory-note, who had given notice only to the last indorser, could not have recourse against the prior indorsers, to whom no notice had been given. This decision, of course, did not touch the question as to the holder's title to avail himself of the notice given to such indorsers by other parties to the bill or note, which must be decided on the principles already explained.

For example, it has been held ¹, that the makers of a note payable at a particular banking-house, but of which payment was refused on the ground of "no effects," were not entitled to notice; and in another case, where the drawer and drawee of a bill were considered as identical, it was held to be a promissory-note, and the drawer's executors were subjected in payment, without notice of the dishonour to him ². It has been also repeatedly decided, that the acceptor of a bill payable at a certain place, for instance, at the house of his bankers, was not entitled to notice, because he was bound to see that payment was made there ³. In case of the bankruptcy of the drawer or of an indorser, and a sequestration or commission of bankruptcy against him, notice should be given to the bankrupt, or to the trustee vested with his estate for behoof of his creditors ⁴; at least, it will be no excuse for want of notice, that his estate is vested in assignees, provided his house is still open, whether in possession of a messenger or not ⁵, so that notice left there would reach his assignees. Whether the holder is bound, after a bankrupt's house is shut, to go in quest of assignees for the purpose of giving them notice, has not been determined ⁶. It has been found in England, that, even

¹ *Pearse v. Pembertley and others*, 3 Campb. 261, *per* Lord Ellenborough.

² *Roach v. Ostler*, 1 M. and Ryl. 120.

³ First, in *Smith v. Thatcher*, 4 B. and A. 200, where the defendants had accepted a bill payable at a certain banking-house, but had no effects there when it was presented, it was held, on that ground, that they were not entitled to notice of non-payment, doubts being expressed whether the acceptor, in such a case, could be at all entitled to notice, seeing it might be held that, by making the bill payable at a banker's, he constituted the banker his agent, and thus a refusal by the banker, whether he had effects or not, was a refusal by him. In the next case, *Edwards v. Dick*, 4 B. and A. 212, the same doubts were expressed on this point, but it was not necessary to decide it, as the want of notice to the acceptor was pleaded by the drawer, to whom the plea was held to be incompetent. At last, in *Treacher v. Hinton*, 4 B. and A. 417, it was settled, after full consideration, by the whole Court of King's Bench, that the acceptor of a bill payable at a banker's was not, in any case, entitled to notice of non-payment, the banker being truly his agent; so that the banker's refusal to pay was a refusal by the acceptor, and it being besides the duty of the latter to ascertain that payment had been made.

⁴ *Chitty*, 529; 1 Bell, 421.

⁵ *Johnston ex parte*, 1 Mont. and Ayr. 622.

⁶ *Rohde and Campbell v. Proctor*, 4 B. and C. 517; 6 D. and R. 610. In this case, the law was laid down, subject to the reservation stated in the text, by Mr J. Bayley, delivering the opinion of the Court of King's Bench. In the

after a commission of bankruptcy is issued, but before assignees are chosen, notice to the bankrupt is good; because, till the election of assignees, he still represents his estate¹. The same rule would probably be adopted in Scotland at any time after bankruptcy, but before the estate is vested in a factor or trustee for behoof of the creditors. If the party be dead, notice ought to be given to his executor². In one case³, it was held, that notice to a person's known agent was not in general sufficient, though it was doubted, but not decided, whether, in that case, the agent had not continued to represent his principal throughout the transaction. If the party concerned has gone abroad, the rules as to notice appear to be the same which have been explained as to presentment⁴.

It is now settled, both with regard to foreign and inland bills, as well as promissory-notes and bankers' checks, that it is not necessary to give notice to the drawer, in order to charge an indorser. Each indorser is considered, with reference to the holder, as a new drawer, who is, therefore, directly liable to him, whether the original drawer be chargeable or not⁵.

Notice to one of several partners, or joint drawers or indorsers, is considered as notice to all⁶; and, where one of

former edition, I ventured to state the rule more absolutely, but I am now convinced, that it is safer to adopt the reservation suggested by the learned Judge.

¹ Moline *ex parte*, 19 Ves. 216.

² *Vide antea*, 416.

³ Crawford v. Maxwell, 11th Nov. 1737, Elchies, No. 17, v. Bill.

⁴ *Antea*, 415-6.

⁵ In an early case, Pardo v. Fuller, Comyns, 579, it was decided that the holder of a bill was bound, in an action against an indorser, to prove that he had given notice to the drawer. But the contrary doctrine, as stated in the text, was laid down in Bromley v. Frazer, 1 Str. 441, where the point was fully discussed with regard to foreign bills. The same rule was settled with regard to inland bills, and was likewise held applicable to promissory-notes, in Heylin v. Adamson, 2 Burr. 669. In Rickford v. Ridge, 2 Campb. 539, which was an action of recourse by the holder of a banker's check against the party from whom he got it, Lord Ellenborough laid it down, "That the holder of a cheque is not bound to give notice of its dishonour to the drawer, for the purpose of charging the person from whom he received it."

⁶ This was held in Porthouse v. Parker, 1 Campb. 82 where a bill having been drawn by a person as agent of three parties, on one of these parties, and accepted by his authority, Lord Ellenborough held that this acceptance was evidence of its being regularly drawn, and that, as it farther proved that one of the parties knew of the bill, there was no need of notice, since the knowledge of one of these drawers was the knowledge of all. It, of course, follows that express notice given to one of them would be held as notice given to all.

them is likewise acceptor, his acceptance, implying knowledge of the bill, will stand as notice to all of them¹. Notice to a clerk of the drawer and indorser, given at his place of business, will be as effectual as to himself; but not when it is given in a place not appropriated to the master's business².

The holder may select for recourse what parties he chooses, by giving notice to them alone. For instance, if he gives notice only to an intermediate indorser, all the parties subsequent to that indorser will be discharged. But, if this indorser gives notice in due time after receiving it, to one or more of the parties prior to him in the bill or note, his notice will not only preserve his own recourse, but will enure to the benefit of the holder, if he chooses to claim against these parties. Such is the general rule as to bills or notes. But it is a question whether that rule is limited as to inland bills, by the act 12 Geo. III. c. 72, which provides, § 41, that "it shall be sufficient to preserve the said recourse," (viz. against the drawers or indorsers of inland bills, and the indorsers of promissory-notes,) "if notice is given of the dishonour within fourteen days after the protest is taken." These words seem to import, that recourse shall *not* be preserved, at least to the person taking the protest, viz. the holder, unless against those parties to whom notice is so given. No limitation is stated as to the person giving notice, and therefore it seems to be equally good, whether from the holder, or from other parties, but under condition that it shall not be available to the holder, unless given within the time specified. But the question is, whether such notice, though given beyond the time specified, not by the holder, but by an indorser, would be effectual, *at least to such indorser*, or would be ineffectual to any purpose whatever; so that an indorser, who got notice only on the fourteenth day, and was thus prevented from giving it to prior parties within the fourteen days, must thus lose his recourse against them, though he himself remains liable to the holder? The act does not seem intended thus to subvert a privilege conferred by common law on the indorsers of

In *Bignold v. Waterhouse*, 1 M. and S. 259, Lord Ellenborough lays it down as a general rule, "that, where several are concerned together in partnership, notice to one is equivalent to notice to all." *Vide* also 1 Bell, 420.

¹ *Vide* *Porthouse v. Parker*, 501, note 5.

² 1 Bell, 420.

all bills or notes, inland as well as foreign, viz. the right of preserving their recourse, by giving notice in a reasonable time after they receive it, and such a privilege cannot be considered as taken away, without express words.

Accordingly, this privilege seems to have been admitted as between an indorser and prior indorsers in cases of promissory-notes, although they are included under the act 12 Geo. III. c. 72, § 41. In one case ¹, the notice by an indorser having been only put into the Post-office on the fourteenth day after the protest, and not having reached the indorser to whom it was addressed till the nineteenth day, he was, notwithstanding, held liable in recourse, as the delay arose from not getting his address in time, on the ground that it was sufficient, as *between indorsers*, that there had been no improper negligence in giving notice. Although this, being the case of a promissory-note, fell under the act 12 Geo. III, it was maintained with success, that this act did not apply to the case of indorsers *inter se*. The same principle was adopted in another case ², where, in a question under a promissory-note, as to the intimation by one indorser to another, both residing in Scotland, it was determined, without reference to the statutory period of fourteen days, that the notice was insufficient, as not made within a reasonable time, having been neglected for three days after the party giving it had received notice. In another case, delay to notify the dishonour of a note for *twenty-one days* after the protest, was excused, by the circumstance of the party himself not having got notice sooner, though he was probably allowed too great latitude even on that principle, having got notice on 12th August, and not having given any till the 14th, although the other party lived in the same town ³. In another case ⁴, where the holder of an inland bill had not given notice to an indorser for seventeen days after the protest, not being able till then to get his address, the Court held that there was sufficient notice. This decision seems to be justified on the ground that notice could not be given sooner. But another ground for it appears more questionable, viz.

¹ Carrick v. Harper, 23d May 1790, Morr. 1614.

² Batchin v. Orrs, June 1792, Morr. 1619.

³ Henderson v. Duthie, 19th Jan. 1799, Morr. App 9, v. Bill.

⁴ Andrew v. Adam, 2d June 1812, F. C.

that the same strictness of negotiation is not required between the *indorsee or holder* and the indorser, as between the former and drawer. It may be true, that between *one indorser and another*, the act 12 Geo. III. c. 72, does not apply, and that therefore reasonable notice forms the only rule between them. But the act is express as to the necessity of the holder giving notice within fourteen days, in all cases whatever.

It is not indispensable, under the act, to preserve the holder's recourse against a particular indorser, that *he* should give notice within the fourteen days, not only to that indorser, but to all the previous parties, or, that he should give this indorser notice in such time, that he may be himself enabled to give it within the fourteen days to the several parties liable to him. The act bears, that the holder shall preserve his recourse either against the drawer *or* indorsers, by giving them notice within the time specified; and it is thus implied, that his recourse against any party will be preserved by giving *him* notice within that time, though he should give no notice to any other party, and though this party should not receive his notice till the fourteenth day. This view of the act, indeed, is conformable with a principle at common law, viz. that the holder preserves his recourse against all to whom he gives notice. But the act imports, that he cannot avail himself of any notice given beyond the fourteen days, whether from himself or from another party¹, though it does not say that such notice shall be ineffectual to the *party giving it*, if given within a reasonable time after he gets notice. This case, not being apparently contemplated by the act, must be determined, by the rules of common law, in favour of the party giving such notice. Nor was it probably contemplated, that the holder would be enabled to avail himself of notice by other parties to the bill, if given within the fourteen days, but not if it was given beyond that period, though it might be available to the party giving it. But the words of the act, combined with the rules of common law, appear to warrant no other doctrine².

¹ There appears, therefore, to be strong ground for doubting the reasons given for the judgment in *Andrew v. Adam*, as already stated, 503, note 4.

² I feel considerable diffidence in stating the foregoing view of the act 12 Geo. III. c. 72, as it differs somewhat from that taken by a learned author who has discussed the same subject; 1 Bell, 420. There do not appear to

When a bill has been presented to a bank where it is payable, and refused for want of advice, of which due notice is given to the plaintiff and indorser, and by him to his prior indorser, it does not affect his right, on retiring it, to sue this indorser, that, in consequence of its having been subsequently presented at another bank, and refused from inaccurate spelling in the name of one of the indorsers, the inaccuracy was rectified, and the bill again presented at the second bank and refused, this being held unnecessary, after presentment at the first bank, where the bill was payable ¹.

9. Notice, when unnecessary ?

When a person is not a party to a bill or note, though he has given it to the holder, he cannot insist on the same strictness of negotiation and notice as a drawer or indorser. No doubt, a person who has transferred, by mere delivery to a third party, certain notes payable to the bearer, without indorsing his name on them, is entitled to due notice of their non-payment, and is freed from all recourse on them by want of such notice ². In the case now referred to, the defendant, from having been bearer of such notes, was in some sense a party to them. But, in a case ³ where a party took, in satisfaction of a bill due to him, (though, as was held, not as a substitute for it,) a bill drawn by a third party whose name was not on the first bill, and the last bill was dishonoured, but the dishonour not intimated to the drawer, it was held, that the creditor might recover on the first bill against the parties to it, to whom the negotiation of the other bill was *jus tertii*. On that principle, it was superfluous to give them notice of its dishonour. It has been also held ⁴, in an action for a debt against a party who had handed over a note to the plaintiff in payment of the debt, without indorsing it, that it was not necessary to prove presentment of the note to the maker. It cannot here be urged, as by direct parties to bills, that strict adherence to the rules of negotiation is necessary for their se-

be any decisions applicable to the subject, except those which have been already cited.

¹ Leonard v. Wilson, 4 Tyrwh. 415.

² Camidge v. Allenby, 6 B. and Cr. 373.

³ Bishop v. Rowe, 3 M. and S. 362.

⁴ Goodman v. Coates, 1 M. and Rob. 221.

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curity and currency; nor is there the same objection, as in that case, against inquiring into the injury which may have been suffered by failure in negotiation. On the other hand, when the acceptor of, or any other obligant in a bill, has drawn or indorsed another bill in payment of it, neglect to notify to him the dishonour of the last bill releases him, not only from it, but also from payment of the first bill¹.

Persons who have given a bill or note without their names being on it², or who are bound for payment of it by a separate letter of guarantee, do not seem entitled to the same strictness of negotiation as if they had been direct parties³, though it is not easy to fix a certain rule as to the negotiation they may require. It may perhaps be held, that they are entitled to fair, though not rigid negotiation,—for example, to get notice of dishonour, not so soon as is required in bills, but within such time as may enable them to protect themselves from loss, and that, if the holder fails in these requisites, he must shew that the guarantee has not thereby suffered damage. But it does not seem to have been quite settled where the *onus probandi* on this point lies; for, in the cases referred to, there has been either direct proof of injury, or proof that there could be no injury. Thus⁴, the holder of a bill, which was said to be included under a guarantee by the defendants, was cut off from recourse against them, as he had neither presented the bill nor notified its non-payment, either to the drawers or the guarantees, though the acceptors did not become bankrupt for a year, or the drawers for eight months afterwards, so that, but for his neglect, he might have secured payment, or the guarantees might have made good their relief. On the other hand⁵, it was held to be no defence to a guarantee against payment of a bill drawn for a debt for which he had become bound on the acceptor's account, that it had not been presented at the term of payment, when such presentment would have done no good, as the acceptor had previously become bankrupt. Again⁶, where the plaintiff had

¹ *Bridges v. Berry*, 3 Taunt. 130.

² *Van Wart v. Woolley*, 3 B. and Cr. 439; 5 D. and R. 374.

³ *Phillips v. Astling*, 2 Taunt. 206.

⁴ *Ibid.*

⁵ *Warrington v. Furber*, 8 East. 242.

⁶ *Swinyard v. Bowes*, 5 M. and S. 62.

got from the defendant, but without his indorsation, a bill drawn by him upon and accepted by a debtor of his, and the bill was dishonoured on 4th February, but no notice given to the defendant, it being proved, however, that between 4th and 11th February, at which last date the acceptor became bankrupt, he could not have paid the bill, the defendant was held not to be discharged for want of notice, as he had not suffered loss. In another case¹, where the holder of a bill notified the acceptor's insolvency to a guarantee before the bill became due, the latter was found not entitled to object that there had been no regular presentment, or notice of non-payment, as he could not have suffered any injury through the want of them. Although none of these cases decides the question of *onus probandi*, yet, as it was undertaken by the holder, in the third and fourth cases now cited, it seems rather to be implied that it remains with him.

Such is the law, so far as it can be deduced from the English authorities, regarding guarantee as applicable to bills. What is the law of Scotland on the subject it is difficult to say. In two early cases, one mentioned by Forbes, and the other shortly noticed by Lord Elchies², it is said to have been held, that a person granting a letter of credit guaranteeing a bill was entitled to the same notice of its dishonour as an obligant on the bill. On the other hand, it has been repeatedly held, that, when a person guaranteed a certain advance to be made to another party, the creditor might make good the guarantee against him on instructing the advance, without notifying it to him at the time of making it, or giving notice of the debtor's failure to pay, as of the dishonour of a bill. This was held as to a letter of credit for advances made by bills, though the letter did not specially refer to the mode of advance, where no notice was given except by raising the action, after the principal debtor had become bankrupt, and had absconded³. In another case, where a letter of credit had been given for the purchases to be made by a certain indivi-

¹ *Holbrow v. Wilkins*, 1 Barnew. and Cressw. 10; 2 Dowl. and Ryl. 59; *vide* also, as illustrating the same doctrine, the opinions expressed by the Court in the case of *Van Wart v. Woolley*, 3 B. and Cr. 439; 5 D. and Ryl. 374.

² *Alexander v. Wood*, 20th Nov. 1735, Elchies, No. 8; *Ewing v. Burnett*, Forbes, 10; Morr. 8219.

³ *Mausfield v. Weir*, 9th June 1749, Morr. 8221.

dual within a limited time, the granter of the letter was made liable, without notification, although the principal debtor had in the meantime become bankrupt; the majority of the Court holding, without laying down a general rule, that, in this case, where the amount of furnishings was not great, and the period of the letter limited, no notice was necessary¹. In a case², where a person had granted a letter agreeing to guarantee such sums as another party might draw for, thus directly referring to bills, the Court sustained recourse against him on the letter, after the principal debtor's failure, though no notice had been given him, either of the advances on the bills, or the balance unpaid, which had been due for some time before. In a later case³, where the defender had granted a letter of guarantee for a promissory-note, bearing, that the note was to be renewed for four months longer, and had afterwards, in another letter, agreed to the renewal, and, at the same time, expressed his understanding that the money was to lie for a considerable time, he was held not to be released by the circumstance of no renewal having been taken, or notice given of the non-payment of the first note, and no diligence having been done on it for several months after it became due. But, in a case⁴, where the defender had granted a letter of guarantee, which was held to apply to certain bills, the Court decided, though ultimately with hesitation, that the circumstance of the holder having failed to protest certain of these bills, when they became due, against the different parties to them, though all these parties had previously become bankrupt, and the holder had ultimately drawn dividends from their different estates, cut off his claim of recourse against the guarantees. Whether there is any difference in such a case as to the guarantee's liability, between want of protest and want of notice, when all the parties to the bills have previously become bankrupt, or whether the guarantees are entitled, in either case, to require strict negotiation, is a question which probably requires to be reconsidered.

¹ *Ewing v. Wright*, 2d June 1808, *Morr. App. to Letter of Credit*, 1.

² *Hamilton v. Carlisle and Dunlop*, 13th June 1766, *Morr.* 8227; *vide also Stewart v. Frew*, 17th Feb. 1779, noticed *ibid.*

³ *Todd v. Davidson*, 3d June 1828, 6 S. and D. 904, and F. C.

⁴ *Alexander v. Scott*, 28th Nov. 1827, 6 S. and D. 151, F. C.

In a case¹ where the drawer of a bill had, on the acceptor's failure to retire it, promised by letter, notwithstanding an alteration on the bill, to retire it in fourteen days, and, within that time, sent a new draft on the same acceptor at ten days, which he desired the creditor to get accepted, and advise speedily, it was decided that the creditor, by neglecting to notify the non-acceptance and non-payment of this draft for two years, during which time the drawee had become insolvent, had forfeited all claim even on the first bill. In another case², a party guaranteeing the regular acceptance of bills by a separate letter, was found not released by their not being presented till the term of payment, when, in consequence of the drawer's intervening failure, acceptance was refused. It was held, that he could not insist on earlier presentment, unless it had been stipulated in his letter of guarantee.

If the indorser of a bill grants a separate bond to the holder, agreeing to pay him a certain sum *in case the bill is not paid within a specified time*, he cannot plead against payment of the bond, that the bill has not been duly presented for payment, or notice given him of its dishonour, because the bond is due on the sole condition of *non-payment* of the bill, without reference to its due negotiation³. So, when all the parties to a bill are, besides, joint obligants to the holder in a bond of caution for payment of that and other bills, an indorser, though discharged as indorser by want of negotiation, will be liable under his bond of caution, unless he has suffered damage through want of negotiation⁴. An obligant in such a bond of caution, whose name is not in the bill, is not entitled to plead the want of negotiation⁵. The liability of such parties seems to depend on nearly the same principles as that of guarantees.

The drawer of a bill will not be considered, in an action against him, as dispensing with notice of its dishonour, although, in the apprehension of dishonour, he has, before the term of payment, lodged money to meet it with two subsequent

¹ Smith v. Wright, 26th Nov. 1829, 8 S. D. B. 124.

² National Bank v. Robertson, 3d Feb. 1836, 14 S. D. B. 402.

³ Murray v. King, 5 B. and A. 165.

⁴ Jarron v. Smith and Company, 17th June 1803, Morr. App. 18, v. Bill.

⁵ Ibid.

indorsers, on a receipt from them agreeing to repay him when they are exonerated from the bill, since they are held to be exonerated when he is discharged for want of notice¹. If the indorsers had received notice, they, by giving notice to the drawer, might have preserved both their own and the holder's claim against him, and thus the deposited money would have been applicable to their own relief. But, in the case cited, they appear to have got no notice, since no claim was made against them; and the drawer, not having got notice either through them or from the holder, was also discharged.

10. Want of notice, when excused ?

The want of due notice to an indorser has been found not to be excused by parole evidence of an understanding by him that payment was not to be exacted till after the term of payment; it being held, agreeably to the doctrine already explained², that a written instrument could not be contradicted by parole evidence³.

In a case where the holder of a bill, on payment being refused, protested, and gave notice to the drawers, but also informed them, that, as the acceptor hoped for money to pay it from a friend, he would do nothing on it for a few days, unless they (the drawers) wrote to the contrary, it was decided that they could not be discharged by his not giving second notice⁴, the measures proposed as to the acceptor being held to be adopted by him merely as agent for the drawers, and not as renouncing his recourse against them.

If a bill has been seized by the Crown under a writ of extent before it is due, recourse against the drawer or indorsers, it is said, will not be lost by neglect to give them notice of its dishonour, because the Crown cannot be injured by the negligence of its servants⁵.

Neglect or delay to give notice may be excused by any cause not arising from the holder's fault, which has rendered notice impracticable; for instance, by the drawer or indorser, for whom notice was intended, absconding to avoid his credi-

¹ *Clegg v. Cotton*, 3 Bos. and Pull. 241-2, per Lord Ellenborough, confirmed by the Court of King's Bench.

² *Antea*, 12-13.

³ *Free v. Hawkins*, 8 Taunt. 92.

⁴ *Forster v. Jurdieson*, 16 East. 105.

⁵ *West on Extents*, 28-9.

tors¹, or by the sudden illness or death of the holder or his agent, who was employed to give notice, or any other accident which prevents notice from being given². Such grounds of excuse would probably be sustained, even in favour of the holder of an inland bill or promissory-note, for failing to give notice, in terms of the act, within fourteen days after the date of the protest; for such an enactment must be understood to except those cases where accident has rendered the literal fulfilment of it impossible. But the holder will not be excused for delaying notice after the impediment to his doing so is removed. It has been held that a party's detention from home by the dangerous illness of his wife is no excuse for not forwarding to a prior indorser notice of dishonour which reached his house by letter during his absence, as he was blameable for leaving a person who had no authority to open letters³. The loss or destruction of a bill affords no excuse for delaying to give notice of non-payment⁴.

When a person has drawn a bill without having effects in the drawee's hands down to the time of its presentment, or having any other claim for his acceptance, he is liable in general to recourse, whether dishonour be notified to him or not. This rule is subject only to one exception, to be afterwards noticed, where a person subscribes his name as drawer to an accommodation-bill for some of the other parties. The rule follows from the principle of notice, which is, that the drawer has reason to believe, unless told the contrary, that his draft will be honoured, and that therefore as the holder, by neglect of notice, leads him to suppose that this has been done, he must incur the risk of the bill. But that principle fails when the drawer has neither effects in the drawee's hands, nor any claim for acceptance, since in that case he must expect the dishonour of the bill from the first. It has been accordingly settled, both in Scotland and England, that he is not entitled to notice in such a case⁵. He cannot even

¹ In *Walwyn v. St Quintin*, 1 Bos. and Pull. 652, it was implied that this would have afforded a good excuse in law for want of notice, but the jury held that it was not consistent with the fact.

² Several cases of this kind are put in *Hilton v. Shepherd*, 6 East. 15, note.

³ Per Lord Ellenborough in *Turner v. Leach*, Chitty, 486, note 6.

⁴ *Thackray v. Blackett*, 3 Campb. 164, per Lord Ellenborough.

⁵ This doctrine is implied in an early case, *Scott v. Cockburn*, Dec. 1684,

plead any other failure in negotiation ; for instance, that the

2 Brown, Suppl. 66, where the want of effects by the drawer, in the drawee's hands, was admitted to excuse irregular presentment. But it was held, in this case, contrary to the doctrine now adopted, that the drawer must prove that he had effects. The same excuse was allowed in *Mackenzie v. Urquhart*, Jan. Feb. 1731, Morr. 1561, where, however, it was held erroneously, that the drawer must prove that he had effects ; in *Littlejohn v. Allan*, 12th Dec. 1746, Morr. 1569 ; and in *Langley v. Hogg*, 17th June 1748, Morr. 1574. In all these cases, the objection was directed partly against the regularity of the protest. In *M'Adam v. M'William*, 14th June 1787, Morr. 1613, 1 Bell, 429, note 5, where the drawer of a bill objected that he had got no notice of its dishonour, the Court, in respect that the drawer had no effects in the acceptor's hands, held that he could not insist on the rules of strict negotiation. In *M'Alpin and Company's Creditors v. Parsons and Govatt*, 21st June 1792, Morr. 1617, effect seems to have been given to a similar answer to an objection made by the drawer, viz. that the bill, though it became due on 27th June, had not been protested till 16th July. In *Hill v. Menzies and Anderson's Trustees*, 5th June 1805, Morr. App. v. Bill, 23, the same answer to an objection by the drawer's trustee, that the bills in question had not been protested for several months after they became due, was sustained. A contrary doctrine seems to be implied in a case, *Fairholms v. The Sun Fire-Office*, 23d June 1761, Morr. 1588, where recourse against the drawer of a bill was found to be cut off by neglect to notify the dishonour of it to him, though he had no effects in the acceptor's hands. But this point was mixed up with several others, and the case cannot be viewed as a precedent, in opposition to those which have been now cited.

In England, the first case in which this point was solemnly considered, was that of *Bickerdike v. Bolman*, 1 T. R. 405, where the Court of King's Bench held that the drawer was not entitled to notice, seeing the drawee had no effects of the drawer in his hands from the date of the bill till it became due, but, on the contrary, was his creditor all the time. The principle of that decision, particularly as explained by Mr Justice Buller, is, that the presumption that the bill will be honoured, from the drawer having effects in the drawee's hands, is obviated by the fact, that he has no such effects. Mr J. Buller distinguishes this case from that of *Tindal v. Brown*, in which he says that the jury once found for the plaintiff, on the ground of its not being proved that the drawer had suffered injury from want of notice, by stating that, in that case, the mere acceptance of the bill was *prima facie* evidence of there being effects ; and no evidence was brought to redargue it. (In Scotland, as already explained, this presumption arising from the acceptance cannot, in general, be redargued excepting by the drawer's writ or oath.) The same Judge also mentions a previous case tried before him at Guildhall, in which a special jury had found notice to the drawer unnecessary, as he had no effects in the drawee's hands.

In *Rogers v. Stephens*, 2 T. R. 713, being the case of a foreign bill, it was held to be a sufficient answer to the drawer's plea of want of notice, that he had no effects in the drawee's hands ; and no regard was had to an offer which he made to prove that he had been authorised by a third party, his debtor, to draw on the drawee for a sum which the latter owed to this party, and that he had settled accounts with this debtor of his, believing, from the want of notice, that the bill had been honoured. It was held that the plaintiff could not be affected

bill or note has not been protested¹, although it has been suggested that a protest is expedient when recourse is to be judged of by the law of a foreign country, as the want of effects may not there be admitted as an excuse for failure in negotiation². It makes no difference that the drawer has been authorised to draw by a third party his debtor, who is the drawee's creditor, but is not a party to the bill, since the holder's obligations cannot be affected by private transactions with persons whose names are not on the bill³. But the drawee's acceptance of the bill creates a presumption of effects belonging to the drawer in his hands, which, even in England, must be redargued by other evidence⁴, and which, in Scot-

by such a private transaction between the drawer and a third party not appearing on the face of the bill. There was also another ground of decision, viz. that the defendant had waived the objection of want of notice by a promise to pay. The same principle was recognised in *Goodal v. Dolley*, 1 T. R. 712, and *Wilks v. Jacks, Peake*, 202, though it was held in these cases, that the circumstance of the *drawer* having no effects in the drawee's hands could not excuse want of notice when pleaded by the indorser; in *Gale v. Walsh*, 5 T. R. 239, and *Staples v. Okines*, 1 Esp. 333, although, in both these cases, the proof of no effects failed; and in *Walwyn v. St Quintin*, 1 Bos. and Pull. 652, where it was found unnecessary to notify to the *drawer* the dishonour of a bill which he had drawn without any effects in the drawee's hand, and merely to accommodate an indorser, who had placed title-deeds in the drawer's hands as a security. This doctrine was likewise adopted, after full discussion, with regard to a foreign bill, in *Legg v. Thorpe*, 2 Campb. 310, 12 East 171, (although the drawer had some reason to expect that the drawee, who, however, had no effects of his, would accept, as being the executor of a debtor of his); it being held to be established by *Rogers v. Stephens*, that there was no distinction on this point between foreign and inland bills. The objection, which was repelled in this case, arose from the want of a protest. In *Claridge v. Dalton*, 4 M. and S. 226, *post*, 515, note 2, the same rule was also adopted, as also in *Van Wart v. Woolley*, 3 B. and Cr. 430, 5 D. and R. 374. In *Sharp v. Bailey*, 9 B. and Cr. 44, it was held to have been correctly left to the jury, as evidence of a bill being accepted for the drawer's accommodation, and as a ground for not giving him notice, that the bill was in his handwriting, and made payable at his house, and the jury having found accordingly, a rule nisi for a new trial was refused.

¹ This has been found in Scotland, in the cases of *M'Alpin's Creditors* and of *Hill v. Menzies and Anderson's Trustee*, *antea*, 511, note 3; and in England, with regard to a foreign bill, as to which alone a protest is there indispensable, in *Legg v. Thorpe*, *ibid*.

² *Chitty*, 490.

³ *Vide Rogers v. Stephens*, *antea*, 511, note 3.

⁴ *Vide Mr J. Buller's remarks on Tindal v. Brown*, in the case of *Bickerdike v. Bolman*, *ibid*.

land, can only be contradicted by the drawer's writ or oath'. If acceptance is refused, there will be no presumption of effects; and it will remain with the drawer to prove that the drawee had effects of his at the time of drawing the bill¹.

11. Notice—when necessary,—though drawee has no effects.

The drawer, however, will not be cut off from the privileges of negotiation, though the drawee has no effects of his, if he had good grounds for believing that he had or would have them before the term of payment. The decisions to this purpose are all English; but they proceed on a general principle of the law of bills, viz. that the drawer is entitled to presume, unless he gets notice, that the bill has been honoured; as he had reason to suppose that there were or would be funds in the drawee's hands which would oblige him to honour it. For instance, although there are no effects of the drawer in the drawee's hands at the time of drawing, yet, if he had reason to think that there would be effects before the term of payment, as, when he has consigned goods, not yet arrived, to the drawee, although the latter should reject the goods as of bad quality, and refuse acceptance on account of no effects, yet, if the drawer has no notice of the dishonour, he will be discharged². The same consequence follows, if he had a

¹ Vide Mr Bell's remarks on Lord Braxfield's opinion in *M'Adam v. Macwilliam*, 1. 429, note 5. The doctrine stated in the text has been already explained, *antea*, 87, *et seq.* It was also recognised, when want of effects in the drawee's hands was pleaded, in answer to the objection of want of notice, in *Whyte v. Finlay*, 19th Jan. 1831, 9 S. D. B. 304.

² 1 Bell, 427.

³ So decided, first by Lord Ellenborough, and afterwards by the whole Court of King's Bench, in *Rucker v. Hiller*, 16 East. 43, where, under the circumstances stated in the text, the holder was non-suited for want of notice to the drawer. A similar opinion, with regard to the effect of the drawer having consigned to the drawee goods not yet arrived, was expressed by Lord Ellenborough in *Legg v. Thorpe*, 12 East. 175, and by Eyre, C. J., in *Walwyn v. St Quintin*, 1 Bos. and Pull. 655. In *Robins v. Gibson*, 3 Camp. 334, where the drawee proved that he had no funds of the drawer between the date of drawing and the term of payment, but stated that he had notice, before the bill was presented, that it was drawn on the credit of a cargo shipped by the drawer, which was in the hands of a broker for sale, and of which the proceeds were to be given him to answer the bill, it was held necessary, by Lord Ellenborough, to prove notice of the dishonour of the bill to the drawer. A similar decision was given

right to draw on the drawee under any fair mercantile agreement¹. But, where a person who had furnished goods to another on credit till the end of the year, drew a bill on him payable before that time, it was held that he could not be discharged by want of notice, as he had no reason to expect that the drawee, who as yet owed him nothing, would accept². It has been held in England, that title-deeds deposited in security for the amount of a bill were effects³; and that bills accepted by the drawer for the drawee's accommodation were also effects, and authorised him to expect a similar acceptance in return⁴.

It seems to be enough, in this class of cases, to give the drawer a claim for negotiation, if he has effects in the drawee's hands at any time from the date of drawing to the date of presentment. If he has effects at the time of drawing, he has a right to expect that the bill will be honoured on that account, since it might be presented for acceptance immediately. He will therefore be entitled to notice and all other requisites of negotiation, though the effects should be withdrawn before presentment. For if the bill were presented immediately, his effects then in the drawee's hands would have ensured acceptance; and his right to notice, thus acquired by *bona fides* in drawing the bill, cannot be taken away by a future shifting of the balance between him and the drawee, as that would

lately, in *Lafitte v. Slater*, 6 Bingh. 621, where the drawer was held entitled to notice, the drawee, though he had no funds of the drawer, having accepted, at the request of a third party, who was indebted to the drawer.

¹ This case is stated by Eyre, C. J., in *Walwyn v. St Quintin*, 1 Bos. and Pull. 655.

² *Claridge v. Dalton*, 4 M. and S. 226. *Vide* to the same purpose, *France v. Lucy*, 1 R. and M. 341.

³ In *Walwyn v. St Quintin*, 2 Esp. 515, 1 Bos. and Pull. 652, where an indorser, for whose accommodation a bill was accepted, had deposited title-deeds with the acceptor as a security, Eyre, C. J., left it to the jury to say, whether there were effects in the drawee's hands, and they found that there were effects belonging to the indorser.

⁴ *Per* Lord Chancellor Eldon in *ex parte Heath*, 2 Rose's B. C. 141, 2 Ves. and Beames, 240-2. The same doctrine has been since held at *Nisi Prius*, where the holder of a bill was found to have lost his claim against the drawer by failing to notify its dishonour, in respect the drawer had a right to draw on the drawee, from being liable on other bills accepted by him for the drawee's accommodation, and on which the latter had raised money; *Spooner v. Gardner*, 1 R. and M. 84.

lead to endless investigations inconsistent with the nature of bills¹. Although there are no effects of the drawer in the drawee's hands, either at the time of drawing, or at the date of presentment for acceptance, yet, if the bill has been accepted, and effects of the drawer come into the drawee's hands, before the term of payment, notice of non-payment must be given, because the drawer has effects in the drawee's hands². It is doubtful, however, whether such a subsequent receipt of effects would entitle the drawer to protest or notice, if acceptance had been previously refused on the ground of no effects; because, according to some English decisions already cited³, the holder is not, in such a case, bound to present again for payment, and if not, he may assume that there are no effects, in which case he is not liable either for notice or other steps of negotiation. There is no decision on this point. When the bill is accepted, and effects are lodged with the acceptor before the term of payment, it is of no consequence though they should not be equal to the amount of the bill; because, "if there was an open account between the parties, and the acceptors were indebted in any sum to the drawer before the bills fell due," he had not necessarily ground for believing that his bills would be dishonoured⁴. Even when two bills fall due at different dates, either of which exceeds the sum that the drawee ultimately owed the drawer before they respectively fell due, it has been held, that the drawer was not bound to suppose that either of them would be dishonoured; and therefore it was found, that neglect to notify the dishonour of them to the drawer discharged him from both⁵. So, when the drawees have effects of the drawer in their hands at the time of presentment, although he owes them a much larger sum, and though they have, without his knowledge, appropriated these effects to pay it, he will still be en-

¹ So decided *per* Lord Ellenborough, delivering the opinion of the Court of King's Bench, in *Orr v. Magennis*, 7 East. 359.

² This was held by Lord Ellenborough, under the circumstances stated in the text, in *Hammond v. Dufresne*, 3 Camp. 145; and, though the case was afterwards brought before the whole Court, his Lordship's direction on this point was not questioned.

³ *Antea*, 450-1.

⁴ *Per* Lord Ellenborough, in *Thackray v. Blackett*, 3 Campb. 164.

⁵ *Ibid*.

titled to notice ; because, without it, he cannot know either of the appropriation, or that credit has been refused him on account of these effects¹. When there is a current account between the parties, the drawer seems, in all cases, entitled to due negotiation and notice, because he may otherwise believe that the bill has been honoured on the credit of the account². Some of these opinions were accompanied with strong doubts as to the decision dispensing with notice and negotiation even when the drawer has no effects³ ; but such opinions do not appear to be inconsistent with these decisions.

12. Notice in accommodation-bills and notes.

The doctrine now explained, as to the drawer having generally no claim to notice or negotiation when he has not funds in the drawee's hands, applies, though under certain modifications, to accommodation-bills or notes, in which the parties, without any real transaction among them, subscribe bills or notes under the characters of drawers, acceptors, or indorsers, merely that they may be discounted, and the proceeds of the discount applied to the use of one of them, who is the party accommodated. In such transactions, when entered into for the *drawee's* behoof, the drawer, though he has not effects in the drawee's hands, at the date of the bill, is still entitled to notice. For, it has been held⁴, that in such bills the drawee admits by acceptance that he has got value from the drawer if not at the date of the bill, at least in discounting it ; and that, therefore, if the drawer pays, he has recourse against the drawee as proper debtor. But, to secure this recourse, it is necessary, if the drawee fails to pay, that the drawer should have timely notice of non-payment, as in any other bill, to enable him to take measures against the drawee. Accordingly⁵, where a party had drawn a bill for the acceptor's accom-

¹ *Blackhen v. Dorian*, 2 Campb. 503, *per* Lord Ellenborough.

² *Ibid.*

³ In *Thackray v. Blackett*, 516, note 4, Lord Ellenborough says, "Judges of great authority have doubted of the propriety of the rule laid down in *Bickerdike v. Bolman* ; and I certainly will not give it any extension." *Vide* also his Lordship's remarks on the same subject in *Orr v. Magennia*, 7 East. 359, and in *Legge v. Thorpe*, 12 East. 171.

⁴ *Antea*, 91, note 1, and cases therein cited.

⁵ *Goldsmid and others v. M'Neill and Company*, 26th May 1814, F. C.

modation, the Court, proceeding, not on the fact, which appeared on investigation, that, when the bill became due, the drawees had funds of the drawer in their hands, though not to its amount, but on general grounds applicable to all accommodation-bills, decided that the drawer was discharged by want of notice of non-payment. It was also held¹, that the drawer was entitled to notice from the payee, although the payee only, and not the drawer, had funds in the acceptor's hands. In that case, the drawer had signed for the accommodation of the acceptors, who, by their acceptance, admitted themselves to be proper debtors in the bill, and, consequently, his debtors, if he was obliged to pay through their default, and therefore he had right to negotiation and due notice, that he might secure his relief against them.

This principle ought, perhaps, to have led to a different judgment from that pronounced, in a case² where the payee and indorser of a promissory-note, who had no funds in the maker's hands, but had merely lent him his name to raise money on it, though he knew that he was insolvent, was found liable to the holder without due presentment or notice of dishonour. In this case, the defendant was in the situation of drawer of a bill payable to himself, and the maker in that of acceptor; and the latter, having got value in the proceeds of the discount, was liable, as in an ordinary bill, to the defendant, who had therefore a right to notice, that he might make good his relief. His knowledge of the maker's insolvency could not dispense with the rules of negotiation. The soundness of the decision has accordingly been much questioned³; and it has been over-ruled by more recent cases. In one case⁴, where a person who was lately insolvent had to raise money, granted a promissory-note payable on demand to the defendant, who indorsed it to give it credit, that it might be deposited with the plaintiff's bankers, and they, in

The same doctrine was also held, in an action by the holder against the drawer of a bill drawn for the drawee's accommodation, in *Hill v. Read*, 1 D. and R. C. N. P. 26.

¹ *Scott v. Lifford*, 1 Campb. 246, per Lord Ellenborough.

² *De Berdt v. Atkinson*, 2 H. Bl. 336.

³ *Vide* note on the decision in *Bayley*, 307, and *Chitty*, 472.

⁴ *Smith v. Beckett*, 13 East. 187.

consequence, made advances on it at first, and renewed them at the end of six months without the defendant's knowledge; the plaintiffs, having failed to give the defendant notice of its non-payment, were found to have thereby discharged him. In another case¹, where a party had indorsed for the granter's accommodation, a promissory-note, payable to himself, being thus in the same situation as if he had drawn and indorsed a bill payable to himself for the acceptor's accommodation, the indorser was held to be discharged for want of due presentment and notice, though he knew of the granter's bankruptcy when he interponed his guarantee for him. Both these decisions are contrary to the case first cited. On the other hand², where a person lent his name as payee and indorser of a note, to secure a composition due by the maker, and took effects from the maker to answer it, it was held that he had no right to notice, as he had given up his recourse against the maker, for which alone notice was required.

If the drawer of a bill subscribes it as drawer for the accommodation of another party, for instance of an indorser, (knowing that the other parties also sign for his accommodation, and that he has no claim against them,) he will still be entitled to notice and negotiation, that he may secure his recourse against the party whom he accommodates. In a case already cited³, it was laid down, that the holder of a bill cannot be relieved from the necessity of giving notice to the drawer, unless "by proving that the bill was for the accommodation of the drawer." The principle of this doctrine seems to be, that any party, whether drawer or indorser, is entitled, *ex facie* of the bill, to due negotiation and notice with a view to his recourse against prior parties; and that, though it should appear, (which, in Scotland, it cannot do but by his writ or oath,) that, notwithstanding the form of the bill, none of the parties in it is liable to him but one, for whose accommodation he signed it, this evidence must be taken with the qualification annexed to it, so as to entitle him to negotiation and notice, with a view to his recourse against this party, as much as with a view to his recourse, in the or-

¹ Nicholson v. Gouthit, 2 H. Bl. 509.

² Corney v. Da Costa, 1 Esp. 303.

³ Goldsmid and others v. M'Neill and Company, 26th May 1814, F. C.

dinary case, against the prior parties on the bill. Accordingly, where a bill had been signed by a person, as drawer, for the accommodation of a posterior indorser, it was decided that the holder's claim against the drawer was discharged by his not giving the drawer due notice of non-payment, though neither he nor this indorser had effects in the drawee's hands¹. One of the Judges² held that the defendant might have had recourse against the drawee, though he had no effects, as he had accepted, thereby rendering himself the principal debtor. But the decision proceeded on the ground that the drawer's claim of recourse against the indorser, for whose accommodation he subscribed, was precluded by want of notice. The authority of this case received full effect in a recent Scotch case, decided in the same way, under nearly similar circumstances³. A different rule seems to have been followed under nearly the same circumstances⁴, where a party having drawn a bill to accommodate the payee and indorser, who had deposited effects in the drawee's hands, though the drawer had none, the drawer was found not discharged for want of notice, though notice appears to have been necessary to secure his recourse at least against the indorser whom he had accommodated. But this decision was censured in the case first mentioned, and may be considered as overruled by it, and by the other decisions referred to.

The want of effects of the drawer in the drawee's hands will afford no excuse for neglecting notice or negotiation as to the indorser. He has, in any event, a claim of recourse against the drawer, or against the drawee if he has accepted, though he has no effects; and, with a view to this claim, he is entitled to regular notice⁵, and due negotiation. Accordingly, in an action by the holder against the indorser of a bill

¹ *Cory v. Scott*, 3 B. and A. 619, confirmed by *Norton v. Pickering*, 8 B. and Cr. 610. ² *Abbott*, C. J.

³ *Henderson v. Ker and Johnston*, 24th Nov. 1829, 8 S. D. B. 121.

Vide Lord Medwyn's note in that case.

⁴ *Walwyn v. St Quintin*, 1 Bos. and Pull. 652.

⁵ This was held by Lord Kenyon in *Wilks v. Jacks, Peake*, 202, although it appeared that the drawer had no effects in the drawee's hands, it being held that the indorser had no concern with the accounts between the drawer and acceptor. It was also held, under the like circumstances, in *Goodal v. Dolley*, 1 T. R. 712.

granted for the drawer's accommodation, it was found that the defendant was discharged by want of notice¹. In another case², where a bill drawn without value of the drawer in the drawee's hands had not been presented for acceptance till after the days of grace, when it was dishonoured, this want of negotiation was found to exclude recourse on it against an indorser. Some doubt has been thrown on this decision by a learned author³, but it seems to follow from the principles already stated; for due presentment is as essential as due notice to enable the indorser to make good his recourse against the drawer or acceptor, since it is the immediate foundation of such recourse. A similar decision was given in favour of the indorser of a bill drawn without effects of the drawer in the drawee's hands, as the holder had neither duly protested the bill, nor given the indorser regular notice of its dishonour⁴. The doctrine now stated seems applicable to every step of negotiation. But farther, although an indorser should know that most of the parties to the bill have merely signed it, like himself, by way of accommodation, and has therefore no recourse against them, but only against a posterior indorser for whose accommodation he has subscribed, he will, on the principles already explained, be entitled to negotiation and notice, that he may secure his recourse against this indorser. The contrary, indeed, was once held on the authority of a case already cited⁵; but that precedent has been now set aside⁶; and with reference to the case of an indorser, where a party indorsed a bill which had been drawn without effects in the drawee's hands, for the accommodation of a subsequent indorser, it was decided, after full consideration, that the holder, by neglecting to give notice to the first indorser, had dischar-

¹ *Orr v. Turnbull*, 1791, *Morr.* 1617.

² *Hart v. Glassford*, 21st June 1755, *Morr.* 1580.

³ 1 *Bell*, 429, note 4.

⁴ *Finlayson v. Ewen*, 2d Feb. 1773, *Morr.* 1597.

⁵ *Per* Lord Ellenborough, on the authority of *De Berdt v. Atkinson*, in *Sisson v. Tomlinson*, *Chitty*, 471, *Selwyn's N. P.*, 337, note 31, where his Lordship held that the indorser of a bill, who has given no consideration for it, and knows that the drawer has no effects in the drawee's hands, is not entitled to notice.

⁶ Of this case, *Park, J.*, says, in *Free v. Hawkins*, that it "has been shaken" in every printed book, and in the practice of every one at the bar."

ged him, as he was thus prevented from following out his recourse against the other indorser¹. Lord Ellenborough distinguished this case from the preceding one, on the ground that the indorser did not know, at the time of indorsing, that the drawer had no effects in the acceptor's hands; and he might probably have a claim, on this ground also, against the acceptor, having relied on him at the time of his indorsement, as primary debtor. But the rest of the Court considered the case, independently of this circumstance, solely with reference to his recourse against the party whom he had accommodated. It has been also decided, that a person who indorsed *bona fide*, at the request and for the accommodation of another, a bill drawn and accepted payable to him, but in which both the drawer's and acceptor's names were fictitious, was discharged for want of notice, seeing he required notice to make good his recourse against the party whom he had accommodated².

It seems to follow, that a drawer or indorser's recourse against the parties for whose accommodation he signed the bill, though they are not liable to him *ex facie* of it, does not, as a learned author supposes³, depend on the principle on which it was once decided, contrary to what is now settled, that *the holder* of a bill, accepted for the drawer's accommodation, discharged the acceptor, who was only a surety, by giving time to the drawer who was truly principal debtor.

The error of this doctrine consisted in not observing, that whatever might be the relation of the parties *inter se*, as to their claims of relief, the holder of the bill, though aware of these claims, took it on the faith of their obligations to him, as appearing *ex facie* of it, and was therefore entitled to treat them accordingly⁴. But, when a party signing a bill for another person's accommodation, knows that the other obligants have likewise done so, he has no claim of total recourse against them, though he may insist that they should divide the liability with him. His situation is not, therefore, analogous to that of an onerous holder of the bill. It is only

¹ Brown v. Maffey, 15 East. 216. So decided, in that case, first by Lord Ellenborough, and afterwards by the whole Court of King's Bench.

² Leach v. Hewitt, 4 Taunt. 731.

³ 1 Bell, 430.

⁴ Antea, 364-5.

when he is ignorant of the other parties having signed merely by way of accommodation, and believes them to have drawn, accepted, or indorsed the bill for value, that he has a claim similar to that of the onerous holder of an accommodation-bill.

13. Waiver of notice or negotiation.

Notice or negotiation may be waived. The objection of want of notice is personal to the party entitled to require it. Its purpose is, that it may secure his indemnity; and though it has been deemed expedient to presume, without allowing evidence to the contrary, that this object has been frustrated wherever notice is neglected, the presumption will be obviated if the party interested renounces it. His waiver of notice affords the best evidence, that, as to him, it was not required. Waiver is not, therefore, the revival of the claim of recourse against him, but a declaration that there was no ground for the only plea on which it could be discharged. Hence, if all the parties have got notice but the last indorser, who waives his right to notice and pays the bill or note, the prior parties cannot object to his recourse on them, that it is extinguished. For he has merely an objection which was personal to himself, and is *jus tertii* to them. If they have got notice, they could not resist a claim by the holder of the bill or note, and, as the last indorser, by waiving notice and negotiation, stands between the holder and them, by making payment in their place, they cannot refuse to relieve him. But his recourse against them subsists only if they have got notice or waived it; since the want of it, if it is not dispensed with, will discharge them from all claims on the bill or note, whether by the holder or any other party. On the other hand, as presentment, protest, and other steps of negotiation, must, from their nature, either subsist absolutely as to all the parties, or have been altogether neglected, any party may probably dispense with them, as he does with the want of notice; but all claim against the other parties, whether by him or by the holder, will be extinguished, unless they likewise have dispensed with them.

On the principles now explained, any party, so far as he is concerned, may dispense with notice or any other requisite of negotiation. It has been held, that this may be done by

making a partial payment¹, or by a promise to pay, made after the failure in negotiation has occurred², or a promise by implication, as to "see the bill paid"³; or by an acknowledgment that it must be paid⁴; or even by a promise of the indorser, made in answer to a letter demanding payment, that when he comes to town he will set the matter right⁵; or by a promise, on being asked for payment, to see the acceptor, and call, together with him, on the holder⁶; or by a pro-

¹ In *Vaughan v. Fuller*, 2 Str. 1246, which was an action by the indorsee against the indorser of a note, it was held by Lee, C. J., that a partial payment by the defendant was sufficient "to dispense with the proof of a demand on the maker of the note." In *Horford v. Wilson*, 1 Taunt. 12, which was an action by the indorsee of a bill against the drawer and indorser, an admission by the defendant's attorney that the defendant had made a partial payment, was held sufficient by the Court of Common Pleas to exclude an objection that there had not been sufficient proof of notice.

² This was held by Raymond, C. J., in *Haddock v. Bury*, mentioned in a note to 7 East. 236, with regard to the effect of a subsequent promise by an indorser in obviating the objection that a demand had not been made in sufficient time upon the drawer. The objection seems to have proceeded on the doctrine, now exploded, that a demand must be first made on the drawer, in order to charge the indorser. But the rule as to the effect of a promise in obviating the objection, is notwithstanding correct. A similar decision was given, under the direction of Wilmot, J., in *Whitaker v. Morris*, detailed by Chitty, 553, note *g*, as to the effect of a subsequent promise to pay in obviating the objection of want of notice. The same doctrine was held by Lord Kenyon in *Wilks v. Jacks, Teake*, 204, in answer to an objection of want of notice; by Lord Ellenborough, in answer to a similar objection, and also to the want of a protest, in *Gibbon v. Coggan*, 2 Campb. 188; by the Court of King's Bench in *Lundie v. Robertson*, 7 East. 231, as to the effect of such a promise in superseding the necessity of proof of notice or presentment; by Bayley, J., with reference to the objection of non-presentment, in *Taylor v. Jones*, 2 Campb. 105; by Lord Ellenborough, with reference to the objection of want of notice, in *Wood v. Brown*, 1 Stark. 217; and with reference to the want of proof of presentment, in *Hodge v. Fillis*, 3 Campb. 463.

³ *Hopes v. Alder*, 6 East. 16. The objection which this promise was held to obviate, was founded on the want of notice.

⁴ *Rogers v. Stephens*. 2 T. R. 713, which was also the case of an objection founded on want of notice.

⁵ So decided at Guildhall, with reference to an objection of want of notice, in *Anson v. Bailey*, stated in Buller's *Nisi Prius*, 276.

⁶ *Cooper v. Wall*, Chitty, 536, note *f*. In this case, wherein there was neither due presentment nor notice, the drawer having said, on being asked for payment, that the acceptor had promised to advance the money, and had deceived him, but that he would see the acceptor and call on the holder along with him; Abbott, C. J., held this to be a waiver of negotiation, saying, "that if the drawer deal with the bill after it has been dishonoured, that suffices to charge him."

mise to pay part, which will imply a waiver only as to that part¹; or by an engagement to pay a composition on the whole, which will be a waiver as to the whole²; or lastly, by notice from the defendant to the drawee not to pay, the effect of which, however, appears to be doubtful, though it precludes him from pleading that he had reason to suppose payment was made³. At all events, such a notice will not be considered as dispensing with presentment of the bill⁴. In Scotland⁵, it has been held, that the indorsers of a bill had not waived the necessity of notice, merely because, on receiving a letter from the holders, long after the due time for notice, asking payment, they sent no answer, but wrote to the drawee desiring him to make payment. In another case⁶, a bill of suspension was passed to try a question of waiver, founded on two letters from the drawer and indorser, one promising payment by the acceptor, and another requiring him to make payment. It has been decided⁷, that waiver of notice by an indorser was to be inferred from his including the bill in a trust-disposition for behoof of his creditors, executed after it became due, though the deed contained a clause reserving all objections to the claims, and stated that they were enumerated merely as made by the creditors themselves. This decision, however, seems doubtful; since the reservation, though said to have been merely one of style in all such deeds, must have been meant to reserve every objection⁸. Notice has been held to be waived, by a party writing, asking indulgence, and promising payment, in answer to a letter which demanded payment, several months after the bill had been dishonoured⁹. It has been held in England¹⁰, that an offer by a party, in the way of *compromise*, to give his bill for the debt, does not exclude want of notice if the compromise is refused. A similar decision has been given as to the effect of an offer to pay by in-

¹ *Fletcher v. Frogget*, 2 C. and P. 569.

² *Margetson v. Aitken*, 3 C. and P. 336.

³ *Hill v. Heap*, 1 D. and R. C. N. P. 57.

⁴ *Ibid.*

⁵ *Murray and Son v. Morrison and Son*, 2d July 1824, 3 S. and D. 202.

⁶ *Allan v. M'Donald*, 18th Dec. 1827, 6 S. and D. 260.

⁷ *Coulter v. Martin*, 21st June 1775, *Morr.* 1601.

⁸ *Vide* Mr Bell's note of this case, i. 421, note 6.

⁹ *Turnbull v. Hill*, 16th Feb. 1831, 9 S. D. B. 456.

¹⁰ *Per* Lord Ellenborough, in *Cumming v. French*, 2 Campb. 107, note.

stalments, when refused ¹. A conditional promise by a foreigner, who says that he is ignorant of our law, but that he will pay if he is legally bound, has been found not to supply the want of notice, because, when it is wanting, he is not legally bound ². It is said to have been held, that, though a drawer may waive notice or negotiation by an implied promise, an indorser, as his situation is different, cannot do so unless by an express promise ³. But such a distinction would not probably be recognised in Scotland; since the indorser is considered, with reference to the holder, as a new drawer, and is therefore equally bound with the drawer by any promise, express or implied. There is one difference, indeed, between a drawer and an indorser, viz. that the former has recourse only against the acceptor, whom he may sue at any time; whereas the latter has also recourse against all the previous parties, which he would lose by delay to give them notice. An indorser would not, therefore, probably waive the necessity of notice, so as to become liable, after his recourse against the prior indorsers was lost, for want of notice. But this distinction, though mentioned in the case cited, does not appear to have formed the ground of decision.

It has been explained, that a promise to pay, or partial payment made after the neglect of negotiation has occurred, is

¹ So decided in *Goodal v. Dolley*, 1 T. R. 712, by the Court of King's Bench, who held, that when such an offer was rejected, matters came back into the same situation in which they were before.

² *Per* Lord Kenyon, in *Dennis v. Morrice*, 3 Esp. 158.

³ *Chitty*, 540, referring to *Borradale v. Lowe*, 4 Taunt. 93. In this case, where the indorser, in answer to a letter from the holder requesting payment, and excusing the want of notice, had written that he would not pay the bill unless it was sent to him or the prior indorser, the Court of Common Pleas, notwithstanding, after a full argument, sustained the plea of want of notice; *Manfield*, C. J., who delivered the judgment, stating, that he knew no case of an indorser, after being discharged by the holder's laches, being bound by any thing short of an express promise; and that, in most cases, the defendants have been held liable either in consequence of an express promise, or a promise when they had a full knowledge at the time that they were discharged, or when there was a real debt binding in conscience upon them. His Lordship farther held, that the letter did not amount to an absolute promise, but proceeded on the assumption that the other indorser was liable.

The validity of the doctrine here stated, that the neglect of negotiation discharges the drawer or indorser, and that his promise revives the claim, has been already examined in part, and will be afterwards more fully discussed.

not the revival of a claim discharged by the holder's laches, but rather the abandonment of an objection which would have discharged it. The English courts have proceeded on similar grounds, holding that a promise affords presumptive evidence against the person making it, that negotiation has been duly followed out, so as to render evidence of it unnecessary, and exclude him even from proving want of negotiation¹. If he knew of the want of negotiation when he made the promise, it will exclude him from objecting afterwards, as it implies an admission, which he cannot retract, that there is no subsisting objection to payment of the bill². Farther, though it should

¹ So held by Lord Ellenborough and the Court of King's Bench, in *Lundie v. Robertson*, 7 East. 231, and by Bayley, J., in *Taylor v. Jones*, 2 Camp. 105. In the former of these cases, there having been no notice, and no evidence of presentment, but the defendant, (an indorser), having first positively promised to pay, and afterwards, on the holder calling again at his desire with a note of the expenses, having said that he had got no notice, but that he would pay the bill; the Court of King's Bench, whose judgment was delivered by Lord Ellenborough, decided, that there was no occasion for proving either presentment or notice. His Lordship said, that there was a presumption of due presentment and notice from the first promise, which was absolute, and that, though the defendant stated in the second conversation, that he had not got notice, yet his waiver of notice, which he made in the same breath, excluded the objection, — in short, that the matter was brought back to the first promise, which implied an admission that every thing had been rightly done, and that there was no objection to pay the bill. This opinion seems to imply, that either the first or the second promise would have been sufficient.

In the latter case, Bayley, J., held, that when a party to a bill or note, knowing it to be due, and that he was entitled to notice and all other steps of negotiation, promises to pay it, "this is presumptive evidence of the presentment and notice, and he is bound by the promise so made." Similar doctrine was laid down in *Gunson and others v. Metz*, 1 B. and Cr. 193; 2 D. and R. 334, where the drawer of a bill was found to be excluded from pleading want of notice against the holder, by having made an arrangement for paying the bill to the holder's immediate indorser; thus admitting, as was held, that he still owed it, and thereby acknowledging that he had received due notice.

² *Vide* Lord Ellenborough's judgment in the preceding case of *Lundie v. Robertson*, note 1, as to the defendant's promise, when he knew of the want of notice.

In one case, *Potter v. Rayworth*, 13 East. 417, Mr J. Bayley is said to have laid it down, that a promise is either an acknowledgment of notice, or an admission that, without such notice, he was properly liable, "as the party for whose use it was drawn." But this last alternative would be inapplicable in Scotland, where such a promise could not be allowed to redargue the evidence as to the liability of parties, arising *ex facie* of the bill, unless proved by this party's writ or oath.

not be proved, it will be presumed, that he knew of the failure¹; and, where no direct failure in negotiation is established, the promise will relieve the holder from proving, as he is otherwise bound to do, that there has been due negotiation². In one case, indeed³, where an indorser had said, that though he knew he was discharged, yet he would pay the bill, this was held not sufficient, without proving a demand on the acceptor, since the indorser could not be liable but on his failure to pay. But the indorser here referred only to want of notice, and intended by his promise to make up for it alone. The efficacy of the promise still depended on the assumption of recourse against him having taken effect, which it could not do unless a demand on the acceptor was proved. This case, therefore, does not interfere with the foregoing doctrine. It has been held⁴, that an offer made for the indorser to pay £.30 on account of the bill, with costs, and secure the residue by a warrant of attorney, does not dispense with notice, being a mere offer made on condition of getting time. The contrary was decided soon afterwards⁵, regarding an offer to pay a composition of 10s. *per* pound, which was held to be a waiver of notice, as it had been in another case, regarding an offer to pay all the drawer's debts, which was rejected⁶. But this decision appears to be very doubtful⁷.

It has been held in England, (and seems also to be law in Scotland,) that a promise of payment will be effectual after an action is raised, as much as if made before it⁸. But a promise of payment, or a partial payment, will not be effectual, if the

¹ *Vide* Hopley v. Dufresne, *post*, note 8, and Turnbull v. Hill, 525, note 9.

² *Vide* opinions expressed in the cases cited 527, note 1.

³ Brown v. M'Dermot, 5 Esp. 265, *per* Lord Ellenborough.

⁴ *Per* Denman, C. J., in Standage v. Creighton, 5 C. and Pay. 406.

⁵ *Per* Park, J., in Dixon v. Elliot, 5 C. and Pay. 437.

⁶ Margetson v. Arthur, 2 Dans. and Lloyd. 159.

⁷ *Vide* Cumming v. French, *ante*, 525, note 10.

⁸ In Hopley v. Dufresne, 15 East. 275, where the holder of a bill had been at first non-suited in an action against the drawer for want of due presentment, it was afterwards urged that the defendant had waived this objection, by applying, after the declaration was filed, for time to pay the bill; and, though it was not proved that he knew then of the want of due presentment, yet the Court, (*per* Lord Ellenborough,) holding that it should have been left to the jury to say, from the circumstances of the case, whether the defendant knew of this at the time of his application, granted a new trial. It is of course implied that, if

party making it is proved not to have known, at the time, of the failure in negotiation¹, or if payment was made, in consequence of the acceptor's embarrassed circumstances, not to the holder, but to the last indorser, before the bill became due, and, therefore, on the assumption that due notice would be given². It has been even held, that a payment made under protest, in ignorance of want of negotiation, may be recovered back, when the person making it did not know of the failure in negotiation, and the other party improperly concealed it from him³. A person, however, paying a bill or note from ignorance of the want of negotiation, for instance, of notice, will not have a claim of reimbursement against other parties, prior to him on the bill or note, who have not received notice, as they are thereby discharged, but his only claim will be against the party who has improperly taken payment from him⁴.

the defendant did know, which seems presumable, his application would have been a waiver of the objection.

¹ In *Goodal v. Dolley*, 1 T. R. 712, it was held *inter alia* by the Court of King's Bench, that a promise to pay could not bind the defendant, when made in ignorance of the want of notice. The same doctrine was held in *Blessard v. Hirst*, 5 Burr. 2670, where the defendant had made a promise of payment, while he was not aware that the plaintiff had not given notice of the non-acceptance of the bill, (though it had been separately presented for acceptance,) till after payment likewise had been refused.

² *Pickin v. Graham*, 3 Tyrwh. 923.

³ So held in *Chatfield v. Paxton*, 2 East. 471, note. The case is a circumstantial one, from which it is not easy to deduce any general principle. The plaintiffs, the drawers of a bill, the holders of which had been guilty of laches, by giving indulgence to the acceptor, having got some notice of this laches, but not having, as the majority of the Court held, a sufficient knowledge of it, accepted another bill for the amount of the first bill, and afterwards paid it, but under protest that they should be afterwards entitled, if the holders had been guilty of laches, to recover back the money. They accordingly brought an action for this purpose, and had a verdict, which was affirmed by the whole Court; it being held, as already mentioned, that they had no proper knowledge of the defendant's laches at the time of making the payment, and that the defendants had improperly concealed it from them.

⁴ In *Roscoe v. Hardy*, 12 East. 431, the posterior indorser of a bill who had paid in his own wrong, seeing that he as well as all the prior indorsers had been discharged for want of notice, was found, though he had taken a re-indorsement, to have no claim of recourse against a prior indorser. The same doctrine was held with reference to a claim of recourse by a posterior indorser who had paid, against a prior indorser, in *Turner v. Leach*, Chitty, 511, note a, and 4 B. and A. 451.

But a party cannot get quit of the effect of a partial payment, or promise of payment, by pleading, that he did not know their legal effect. Thus¹, where the drawer of a bill, after being aware that the holder had given time to the acceptor, said, "I know I am liable, and if Jones" (the acceptor,) "does not pay, I will," it was held to be no answer to this promise that it was made in ignorance of the law. Again, in the case of a foreign bill², where the declaration alleged that the bill had been regularly presented and protested, this was held, in an action against the drawer, to be proved by his saying that it was all regular, and that he wished to make an arrangement for payment of it. In another case³, the indorser of a note having said, on being arrested for it, that it was true his name was on it, but he had security, though he wished time to pay it, it was held that such a promise, made in ignorance of his rights, could not excuse the want of notice. But this decision seems contrary to the principles established by more recent cases, and appears to have been influenced in part by the situation in which the promise was made.

When a party waives negotiation by a promise of payment, this promise is effectual, not only to the party to whom it was made, but to any third party who comes in his right to the bill⁴; for, whoever may acquire it, such a promise precludes the party making it from objecting to his liability.

If the drawer or indorsers receive due notice of dishonour, and all the other requisites of negotiation are observed, they are liable in immediate recourse on failure of the acceptor or granter; but not till a demand is made on them, since it is only then that they can be aware of it. In this respect they differ from the acceptor or granter, who, as already shewn⁵, is liable, at least to the original payee, without a formal demand, since it is his duty to find out the payee and make payment. The drawer or indorsers are bound to pay *immediately*

¹ *Stevens v. Lynch*, 2 Campb. 332, 12 East. 38-9.

² *Greenway v. Hindley*, 4 Camp. 12; *vide also* *Gibbon v. Coggan*, 2 Camp. 188.

³ *Rouse v. Redwood*, 1 Esp. 155, *per* Lord Kenyon.

⁴ *Potter v. Rayworth*, 13 East. 417. The doctrine in the text was established in this case by a verdict given under Lord Ellenborough's direction, and confirmed afterwards by the judgment of the whole Court.

⁵ *Antea*, 381, *et seq.*

when the demand is made on them. It has been laid down, indeed ¹, that they must be allowed a reasonable time after the demand, to make payment; and a case is cited ², where the drawer of a bill, who tendered payment of its amount, but not of interest, the *day after* a demand, and before a writ was issued, (the offer, however, being refused, as he would not pay also the expense of a writ, which had been issued the same day,) was absolved from an action in respect of his offer. The only additional sum which he was bound to have offered in this case was the interest, which, as remarked ³, would have been under three farthings; and this circumstance probably influenced both the Jury and the Court of Common Pleas, who afterwards affirmed their verdict, in dismissing so frivolous an action. But the legal grounds of the decision have been justly questioned by an eminent author ⁴, as the drawer had committed a breach of contract, though slight, in not paying immediately on demand, and was therefore liable for the damages, however trifling, which had been incurred. It was correctly observed ⁵, in delivering the judgment, that he could not know who was the holder till he was informed; but he ought to have paid whenever he got information. It has been held since ⁶, that an indorser is liable to an action for payment, immediately on the dishonour being notified to him.

¹ Chitty, 371.

² Walker v. Barnes, 1 Marsh. 36, 5 Taunt. 240.

³ Bayley, 350.

⁴ Bayley, 350, and in note 38 to the same page.

⁵ Per Sir J. Mansfield, C. J.

⁶ Siggers v. Lewis, 4 Tyrwh. 347, 1 Cr. M. and R. 370, 2 Dowl. P. C. 681, S. C.

SECTION V.

Effect of Novation, Release, or Indulgence by the Holder of a Bill or Note to any Obligant on his Claim against the other Obligants.

If the holder of a bill or note observes all the requisites of negotiation, his recourse against the several obligants will remain, though he should not take active measures to recover payment from the acceptor or granter, this being left to his discretion. Nor have subsequent parties right to complain; because, when the dishonour of the bill or note is notified to them, they become entitled to secure their own relief by paying it, and then suing any of the other parties ¹. It has been farther shewn ², that the holder may take a partial payment from the acceptor or any other party, without thereby discharging the remaining parties. He may likewise, without such a risk, take additional security, for instance an infestment of annualrent, or disposition in security ³ from any other parties, if he does nothing to restrict or discharge, wholly or in part, his claim against the party giving the security. But, if he does this without the assent of those subsequent to that party, and who have therefore a claim against him, his claim against them will be renounced.

1. Discharge—its effects.

The simplest case of this kind is where he expressly discharges the acceptor or granter. It has been held, that, by

¹ The substance of this doctrine is laid down by Eyre, C. J., in *Walwyn v. St Quintin*, 1 Bos. and Pull 652.

² *Antea*, 394.

³ In *Nicholson v. Morrison*, 7th Feb. 1711, *Morr.* 1552, although the Court adopted principles as to notification of the dishonour of an inland bill different from those which are now established, yet, with reference to another part of the case, they justly held that the mere circumstance of the holder taking an infestment of annualrent from the acceptors, such infestment not being considered as taken in *solatium*, did not discharge the drawer. In the later case of *Allan and Son v. Laidlaw*, 3d Dec. 1824, 3 S. and D. 356, it was held to be no objection to the holder's claim against the drawer and indorser of a bill, that he had taken an heritable bond and disposition from the acceptor, partly as a security for the sum contained in the bill.

such a discharge, the debtor is released, not merely from the direct claim by the holder, but from any claim of relief by other parties in the holder's right or otherwise, after paying him; for it would be no discharge, if the debtor were to be free, only as to the holder, and yet were bound to the full amount, when the bill or note was claimed, by any other party who had paid it to the holder¹. Such a discharge, therefore, by the holder to the acceptor, or any other parties, has been held to release the parties subsequent to the party discharged, because it cuts off their relief; and therefore the holder, by granting it, is presumed to have taken the whole debt on himself. In this view, it is not competent to inquire whether the subsequent parties would have reaped benefit from the claim thus cut off, as the holder has taken the claim on himself, without inquiring into this matter. Even though the holder has, on granting such a discharge, got a private composition from the party receiving it, to the full amount of his funds, it will still be held that, by granting a discharge which was to cut off the relief of other parties, without consulting them, he virtually intimated that he assumed the sole interest, and that his claim against them was abandoned. This doctrine has been accordingly adopted in England, where it has been repeatedly decided that the holder of a bill or note releases the indorser by discharging the acceptor or granter on payment of a composition, and that whether the composition was all which could be got from the acceptor's funds or not².

¹ This doctrine is laid down with regard to the effect of giving time to the proper debtor, (and the same rule holds as to the effect of discharging him,) with reference to the subsequent parties, by Bayley, J., in *Claridge v. Dalton*, 4 M. and S. 232. The same doctrine is admirably explained by Pothier, Nos. 175-82.

² This point has been finally settled by the case of *Wilson ex parte*, 11 Ves. 410, where the holder's agent had signed a discharge of the acceptor at Hamburg, on payment of a composition, under a mistaken impression that the proceedings were carried on there judicially as in a commission of bankruptcy. The Lord Chancellor, without regarding this circumstance, held, that by granting the discharge without consulting the drawer, the holder had released his estate. His Lordship referred to Lord Thurlow's opinion to the same purpose in the case of *Smith ex parte*, to be immediately cited; and farther held, that no weight could be attached to the circumstance, which, he said, had made an impression formerly on Lord Rosslyn, that all had been done which could be done for the interest of the other parties, seeing they are the proper judges of that; and "that," as his Lordship observed, "has been carried so far, that the actual

But this doctrine does not appear to be quite settled in Scotland. In a recent case¹, it was held that the indorser of a note, having been discharged under a sequestration, on a composition of 4s. 6d. *per* pound, was not released from payment of that composition, by the fact, of which he said he was not previously aware, that the holders had agreed to discharge the granters on a private composition of 12s. *per* pound. It is not easy to reconcile this decision with the foregoing principles, especially as the grounds of decision are not given. But it probably proceeded on the ground, (which was pleaded,)

"bankruptcy of the acceptor does not dispense with notice to the drawer." This decision settles the general doctrine. The same doctrine had been broached long before by Lord Eldon at *Nisi Prius*, though only incidentally, in *Smith v. Knox*, 8 Esp. 48.

Similar doctrine was adopted, as already mentioned, by Lord Chancellor Thurlow, in *Smith ex parte*, 3 Br. C. C. 1, and Cooke's Bankrupt Law, i. 100, 8th edit., where the holder of a certain bill and note was found to have released the indorsers by discharging the acceptors and makers on payment of a composition, without asking consent of the indorsers. On the same ground, in *Ellison v. Denzell*, 1811, Selwyn's N. P. 5th edit. 363, it was held that a discharge granted by one of several partners, holders of a note, to a prior indorser, on receiving a composition from him, released a subsequent indorser. There is one case, *Perfect v. Musgrave*, 6 Price, 111, where it is said to have been considered as no objection by a joint drawer of a note to the payee's action against him, that the payee had discharged the other drawer on payment of a composition, although the defendant was only surety for the other drawer. But, with reference to the creditor, they were both probably to be considered as joint obligants, with virtual claims of relief against each other, distinct from the note. The same general doctrine was adopted in *ex parte Gifford*, 6 Vesey, 835, although it was held that the creditor, in the note in that case, had not discharged the person from whom he had taken a composition, from the claim of relief by his co-sureties. It was also adopted in *Lewis v. Jones*, 4 B. and Cr. 506. But, in *Thomas v. Courtney*, 1 B. and A. 1, a creditor having agreed to take a composition on his whole debt, though without an obligation to give up securities, it was held, that he was still entitled to recover payment from the acceptor of a bill, which he held for part of the debt, and to retain the sum so recovered. In another English case, *Stonehouse v. Read*, 5 D. and Ryl. 603, 3 B. and Cr. 669, where a party had accepted bills drawn on him by another in favour of third parties, having, at that time, funds of the drawer in his hands to the full amount of the bills, but the bill holders agreed, for his benefit, to take from him a composition of 10s. a pound on the bills, the Court of King's Bench decided, that the acceptor was not bound to communicate the benefit of this composition to the drawer, seeing the latter was as effectually discharged from the bill through the holders' accepting a composition for it, as if full payment had been made. The composition-contract was held to be a transaction between them and the acceptor, with which the drawer had no concern.

¹ *Calder and Sons v. Borthwick*, 17th July 1829, 7 S. and D. 840.

that the agreement for 4s. 6d. went on the implied understanding, that the holders should be at liberty to take as much as they could get from the other obligants. In another case ¹, relating to a bond in which, though both the obligants were *ex facie* principal debtors, one of them was, to the holder's knowledge, only cautioner, it was decided that the holder's recourse against the cautioner was preserved, though he had discharged the principal on payment of a private composition. But this decision proceeded on the ground that the discharge to the principal, according to the true construction of it, was not to take effect, if the cautioner was to be thereby liberated. In another case ² a reference was allowed to the oath of the chargers, whether they, knowing that the suspenders were only cautioners, had discharged the primary obligant, without their consent, on payment of a composition. But this case can hardly be quoted as a precedent.

The holder will not release the subsequent parties, by ranking on the estate of the acceptor, or any of the prior obligants, under a commission of bankruptcy in England, or in Scotland, in a sequestration under the bankrupt statute, although the bankrupt should obtain his statutory discharge on payment of such dividends as his estate yields ³. In Scotland, where the bankrupt statute authorises a discharge, with concurrence of a certain proportion of the creditors, not only on a division of the estate among the creditors, but on payment of, or security given for, a composition, it has been decided, with reference to a debt secured by a letter of guarantee, that the creditor's concurrence in the principal debtor's discharge, on payment of a composition, though without him there could not have been the requisite concurrence of creditors, and though he did not ask the guarantee's consent, did not liberate the latter ⁴. The principal ground of judgment appears to have

¹ *Ogilvies v. Smith*, 22d Nov. 1821, Fac. Coll.

² *Hunter v. Evans*, 26th Nov. 1830, 9 S. D. B. 76.

³ This doctrine, with reference to an English commission of bankruptcy, is implied in the case of *ex parte Wilson*, 538, note 2; in *Stock v. Mawson*, 1 Bos. and Pull. 286; and in Lord Eldon's opinion in *English v. Darley*, 2 *ibid.* 61. In Scotland it has, as will be seen immediately, been carried to the utmost length, having been recognised in the case of a discharge on payment of a composition accepted under the bankrupt act.

⁴ *Whitelaw and Kirk v. Steins*, 20th May 1814, F. C.

been, that the Legislature recognised a discretion in the creditor to give or withhold his consent to the composition, and that therefore he could not forfeit his claim against other obligants by exercising this discretion¹. This doctrine seems to be also applicable between the different parties to bills or notes. But there is no ground for holding that it should be applied to a discharge under a private composition-contract. On the contrary, it follows from the principles already explained², that such a discharge, without the assent of the subsequent parties to the bill or note, would release them; and this doctrine is supported by the decisions, already cited, in similar cases in England. In Scotland it would appear, from some cases already cited³, that the law on this subject is not yet settled.

As to a statutory discharge on payment of a dividend from a debtor's estate, another question occurs, Whether the creditor, when he does not merely rank for the dividend, but concurs in the application for a discharge without the assent of the other obligants, releases them from all claim? It would

¹ It seems to have been farther laid down, as stated by Mr Bell, ii. 475, note 2, that the conduct of the creditor in agreeing to the composition could not be questioned by the guarantee, as the Legislature had given him unlimited discretion on the subject. It would probably be difficult to maintain such a doctrine, in the event of the cautioner proving that the composition was much less than the funds of the principal debtor might undoubtedly have yielded. But, on the other hand, the creditor's power to concur is recognised by the act, and he cannot, therefore, be held to discharge the other parties by merely exercising this power, unless he is proved to have done so injuriously. Another principle of decision has been suggested by Mr Bell, viz. that if the other parties do not themselves pay the debt, and take their relief, they must be held to have given up the right of acting for the best, to the principal creditor. But, 1st, This is a principle distinct from that stated in the report as the ground of judgment, viz. that the creditor's power to concur in a statutory composition is recognised by the act, and would apply equally to private compositions, where no such power is recognised. 2dly, There does not appear to be any ground for holding, that the other parties, merely by not paying the whole debts, for which the debtor is liable as much as them, virtually empower the creditor to discharge, on any terms that he chooses, the claim of relief which is vested in them as far as they may be obliged to make payment. It would appear, that, unless when authorised by statute, as in the case referred to, the creditor cannot discharge this claim, except by their consent; and, therefore, if he does it without their consent, he is justly held to have released them, by cutting off the claim of relief, in consideration of which alone they agreed to become liable.

² *Antea*, 532, *at seq.*

³ *Antea*, 534.

appear, that as the bankrupt act has empowered him to concur in such a discharge, as well as in a composition-contract, he cannot, in either case, lose his claim against the other parties merely by exercising it, if they do not prove that he has done so to their prejudice. Nor does it seem to make any difference more than in a composition-contract, that his concurrence was necessary to complete the proportion of creditors required to authorise the discharge, as he is entitled, by statute, to exercise this power under any circumstances. The only distinction between the two cases appears to be one stated by a learned author¹, viz. that a discharge on a composition is given for value, whereas the concurrence in another discharge is gratuitous, seeing the creditor would be entitled to the same dividend from the funds, whether he concurred or not. But this distinction does not seem to affect the principle already stated.

In both cases, it is, of course, safest for the creditor to get the consent of the other obligants before concurring in the debtor's discharge.

2. Giving time.

The doctrine now explained as to the effect of a discharge by the holder to the debtor, or any other obligant, in releasing the subsequent parties, is equally applicable when he agrees to grant indulgence to a prior party, whether with or without a new security for the debt. Such indulgence restricts in part, as a simple discharge does away the relief competent to subsequent parties against the prior party who gets the indulgence; since their claim of recourse, being *immediate*, is impaired by the holder agreeing that the party shall not be sued for a certain time. By doing so, therefore, without consulting them, he is held, as by a simple discharge, to abandon virtually his claim against them, with which their right of relief is commensurate². Besides it is presumed that, by getting time, the acceptor, or any other party is rendered less active in exerting himself to discharge the bill or note, and thus relieve the subsequent parties, than if he had been liable to

¹ 2 Bell, 442, note 5.

² *Vide* opinion of Bayley, J., in *Claridge v. Dalton*, 4 M. and S. 232, and of Lord Ellenborough, in *Gould v. Robson*, 8 East. 576. *Vide* also *Bank of Ireland v. Beresford*, 6 Dow, 233.

immediate action or diligence. Accordingly, in an action in Scotland by the holder of a bill against the drawer, the latter was assoilzied, on this ground, *inter alia*, that the holder had taken a new bill from the acceptor, including the sum in the former bill, payable at a later date, and had thus prorogated the term of payment as to the acceptor¹. In another case² of a circumstantial nature, where it appeared that one of several original bills by the principal debtor had been given up by the creditor, and a new bill taken for its amount, with the omission of one of the obligants in the first bill, it was decided by the House of Lords, that a party who had signed a cautionary bill, binding himself for several bills, and for this first bill, *inter alia*, was released from that part of his engagement.

The same rule has been adopted in a number of English cases. Thus, in an action by the holder of a note against the indorser, the defendant was found not liable, as the holder had repeatedly given time to the maker of the note between 5th May, which was the last day of grace, and 14th May, when he became bankrupt³. In another case⁴, where the holder of a bill, after getting judgment against the acceptor, had, on receiving from him a partial payment, taken his bond and warrant of attorney for the whole balance, excepting a nominal sum, payable by instalments, he was found to have thereby discharged the indorser, and was therefore non-suited in an action against him. Again⁵, where the holders of a bill had not only taken a partial payment from the acceptor, which they were held entitled to do, but had agreed to draw an additional bill on him for the balance, payable at a longer date than the first, which they also retained in the mean time as an additional security, they were non-suited in an action against an indorser, for having thus given time to the acceptor.

¹ *Flower v. Pringle*, 18th Dec. 1729, *Morr.* 1560.

² *Stirling v. Bank of Scotland*, 13 June 1821, 1 *Shaw's Ap. Ca.* 37.

³ *Anderson v. George*, 1757, *per* Lord Mansfield, *Selwyn's Nisi Prius*, 386-7. A similar opinion as to the effect of giving time to the maker of a note in releasing the holder, is expressed by Buller, J., in *Tindal v. Brown*, 1 T. R. 157.

⁴ *English v. Darley*, 2 Bos. and Pull. 61, *per* Lord Eldon, C. J., whose opinion was afterwards confirmed by the Court of Common Pleas.

⁵ *Gould v. Robson*, 8 East. 576. In this case Lord Ellenborough delivered the opinion of the whole Court of King's Bench. A similar doctrine as to the effect of such a proceeding is laid down in an early case, *Claxton v. Swift*, 3 Mod. R. 86. *Vide* also *Smith v. Beckett*, 13 East. 187, *antea*, 518, note 4.

Here there was a direct agreement to give time. But, when there is no such agreement, the other parties will not be discharged by the holder merely taking a bill or note from the acceptor or grantor, payable at a longer date than the first, without giving up the first, because the new document will be held to be merely a collateral security, unless there is an agreement expressed or implied in the transaction, that it should supersede the first. This was decided in an English case ¹, where it was found that the holder of a bill, by taking another bill from the acceptor payable at a later date, but without a stipulation to give time, did not discharge or limit the claim on the former bill; and on that ground, although he had raised money on the second bill by discounting it, it was decided that another party, who had got the first bill from him by indorsement, was entitled to sue the drawer on it before the second bill became due. The same doctrine appears to have been followed by the Court of Session, in a case where the cautioners of a bank agent were found not to be released by the circumstance of the bank taking a new promissory-note from the agent, (payable at Martinmas next,) for the amount of certain bills discounted by them, and for which they were liable, but under reservation of the effect of all prior securities, and *inter alia* of the bond, by virtue of which the cautioners were liable ². But this decision was reversed on appeal, Lord Gifford holding, that the terms of the note were such as to amount to a giving of time by the bank. In another case ³ it was decided that the holders of two bills subscribed by one party as drawer, and another as acceptor, did not lose their recourse against the drawer, merely by taking notes from the acceptor alone for the same sum, but without giving up the former bills, or making any stipulation not to do diligence on them. The doctrine held both in Scotland and in England

¹ *Pring v. Clarkson*, 1 Barnew and Cresw. 16, 2 Dowl. and Ryl. 78, per Abbott, C. J., and Bayley, Holroyd and Best, J. But *vide* remark on this case in Bayley, 245. *Vide* also *Arundel Bank v. Goble*, Chitty, 447; *Philpot v. Biant*, 4 Bingb. 717; and *Boultee v. Stubbs*, 18 Ves. 20, which is the case of a bond.

² *Thomson and others v. Bank of Scotland*, 29th Jan. 1822, F. C., 2 Shaw, App. Cases, 316.

³ *Allan and Son v. Laidlaw*, 3d Dec. 1824, 3 S. and D. 356. The same doctrine was held in *Sandeman and Miller v. Thomson*, 12th Nov. 1831, 10 S. D. B. 4.

appears to be, that the holder shall be considered as retaining all his rights over the first bill, notwithstanding his acceptance of an additional security, unless he agrees, expressly or by necessary implication, to limit these rights. On the same principles, an agreement to give indulgence to an indorser of a bill or note would release the subsequent indorsers, as it abridges, without their consent, their claim of relief against the party thus indulged ¹. No indulgence, however, to subsequent indorsers, will release prior indorsers, because the latter have no claim against the former which can be cut off². For the same reason, indulgence to the payee will not release the drawer ³, nor will such indulgence to the drawer release the acceptor ⁴. Farther, if the holder of a bill or note takes a security from, and gives delay to one of several parties who are bound in the same character, for instance, to one of several drawers or acceptors, provided he does not agree to rely on his credit alone, but reserves his claims against the others, he will not thereby release any of them, as they have no claim of relief that can be injured by his indulgence, such as a subsequent indorser has against a prior one ⁵, but have claims of mutual relief independent of the bill.

¹ In *Smith v. Knox*, 3 Esp. 48, Lord Eldon, C. J., intimates his opinion, that the holder, if he discharges a prior indorser, will probably find it difficult to recover against a subsequent one. In *English v. Darley*, 2 Bos. and Pull. 62, the same Judge, in animadverting on the case of *Hayling v. Mulhall*, note 4, says, "Had the plaintiff first sued a prior indorser and discharged him from execution, it would have afforded a sufficient objection to an action against a "subsequent indorser." The same principle evidently applies as to the effect of giving time to a prior indorser on the holder's claim against subsequent indorsers.

² This was decided by Lord Eldon, C. J., in *Hayling v. Mulhall*, 2 Bl. 1235. Similar doctrine was laid down by Bayley, J., in *Claridge v. Dalton*, 4 M. and S. 232-3.

³ In *Claridge v. Dalton*, 540, note 4, it was laid down by Lord Ellenborough, and Mr J. Bayley, with whom Dampier, J., concurred, that giving time to the payee of a bill did not discharge the drawer.

⁴ *Ferguson v. Gordon, Batt and Co.* 9th July 1825, 4 S. and D. 165.

⁵ This doctrine was established by the Court of King's Bench in *Bedford v. Deaken and others*, 2 B. and A. 210, where it was found that the holder of two bills drawn by three parties, having taken promissory-notes from one of the parties for their amount, payable at a later date, but retaining the original bills, and reserving his claim against the two other drawers, did not thereby release them from this claim, seeing all the several drawers were from the first equally liable to it. In *Twopenny v. Young*, 3 B. and Cr. 208, 5 D. and P. 258, it

When a party, having a claim against several persons, jointly and severally, but who knew that one of them was liable to the others in total relief, consulted them as to the expediency of granting this party indulgence, but received, from one of them no answer, and then took a note from the principal party, at nine months, to which two of the others agreed, it was decided, that, as the third had, by silence, left him to deal as he thought best, he could not plead that he was discharged by giving time¹.

When ultimate diligence has been raised on a note against both drawer and acceptor, and a third party then grants a bill of his own at six months for the debt, at the acceptor's request, but under condition of being assigned to the first bill and diligence, the drawer cannot plead that he is discharged from the first bill, by time being given to the acceptor during the currency of the second bill². The doctrine of giving time seems not applicable to an interference which relieves both parties from ultimate diligence.

The mere exchange of one bill for another, (both being merely deposited in security of a banker's account not discounted,) by one of the partners of a company which was not

was decided that the holder of a note granted by two parties did not, by accepting from one of them a bill of sale in *farther security* of the debt, relinquish his claim against the other party on the note. In this case, it was held that delay had not been given on the note to the party granting the additional security. But, although it had, it does not appear that his co-obligant would have been thereby released; for, although the holder of the note knew that the latter was a surety, yet, since he signed the note, as a principal obligant, the holder was entitled to rely on him as such, and thus he was bound at all events. *Antea*, 365. &c., *post*, 547. *Vide also* *Perfect v. Musgrove*, 6 Price, 111. The same doctrine was recognised in *Price v. Edmonds*, 10 B. and Cr. 578. The same rule appears to have been adopted by the Second Division of the Court of Session in *Edgar and Lyon v. Robinson*, 3 S. and D. 513, (affirmed on appeal, 3 W. and S. 106.) where the holder of a note granted by two parties jointly was found entitled to recover the full amount from one of the obligants, although he had repeatedly taken renewals of a separate bill from the other obligant for the same debt, always retaining possession, however, of the original note. The case was very circumstantial, and, among other things, it was alleged that the holder knew that the defender had signed the original note for the accommodation of the other obligant. But this circumstance, as will immediately appear, could not restrict his right to deal with the parties according to the characters which they held *ex facie* of the note itself.

¹ *Aikman v. Fisher*, 24th Nov. 1835, 14 S. D. B. 57.

² *Leslie v. Shepherd*, 22d Feb. 1833, 11 S. D. B. 436.

known to have been dissolved, binds the other partners, and does not afford them any ground of release from the debt ¹.

The holder's mere forbearance to sue the acceptor or other parties, will not release the subsequent parties, provided he does not bind himself to give indulgence ². It has been held, for instance, that he will not prejudice his claim against the other parties by receiving proposals for a security from the acceptor ³, or even by taking farther security, if no time is given on the original bill or note ⁴, or by taking partial payments, and offering to take the balance by instalments, under a condition which is never fulfilled ⁵, or by levying a partial payment from one of the obligants ⁶, or by merely stating, in a letter to the indorsers of a note, that the grantor would not be ready to pay for a week, which would be time enough for him, since that did not amount to any agreement with the *grantor himself*, to give him time ⁷. It has been even decided that the drawer will not be discharged by the holder agreeing, after protest for non-payment, and notice, or what is equivalent to it, not to press the acceptor. But it may be doubted, whether such an agreement, if binding, is not as objectionable as a more precise one, so far as it fetters the right of the subsequent indorsers to enforce their relief against the acceptor. In an English case ⁸, it was decided, that a holder did not discharge the drawer by agreeing to give time to the acceptor, on getting another security from him, after judgment had been obtained against both drawer and acceptor. The Court held, that the rule as to the effect of indulgence to the acceptor, in releasing the drawer, does not apply after judgment. Perhaps the same doctrine would be adopted in Scotland, after decree has been obtained, or the protest recorded on a bill or note against all the parties, on the ground that each party, being then liable directly to the holder, thus acquires an absolute right of relief against the prior parties,

¹ *Ogle v. Smith and Co.* 15th Dec. 1824, 3 S. and D. 398.

² *Per Eyre, C. J.*, in *Walwyn v. St Quintin*, 1 Bos. and Pull. 655.

³ *Per Eyre, C. J.*, in *Walwyn v. St Quintin*, 1 Bos. and Pull. 655.

⁴ *Twopenny v. Young*, 541, note 3.

⁵ *Hewet v. Goodrich*, 1 C. and Pay. 468.

⁶ *Ayrey v. Davenport*, 2 B. and P. N. R. 476.

⁷ *Margeson v. Noble*, 2 Chitty's R. 264.

⁸ *Pole v. Ford*, *ibid.* 125.

of which no transaction between them and the holder can deprive him. But it may be doubted whether we would adopt the doctrine since laid down ¹, that the acceptance of a warrant from the acceptor to confess judgment, under condition that judgment should not be taken for three weeks, is not a giving of time so as to exclude a subsequent action against an indorser. Such an act is different from mere delay to enforce payment, as it restrains all parties, during the stipulated time, from taking measures to enforce payment. But the ground of decision, in this last case, appears to have been technical, viz. that no matter arising after the commencement of an action can be pleaded in bar of it generally, in which form the objection had been pleaded. In a later case ², where a cognovit was taken from one of two joint makers of a note, payable in three different instalments, but with liberty, in default of payment, to take judgment and execution for the whole sum, (the first instalment being payable before judgment could, in any event, have been executed), and the first instalment was not paid at the time, so that there was full liberty to take out judgment and execution, the Court held, that there was no such giving of time as to exclude a claim on the other obligant in the note. But they also held, in terms of the rule already laid down, that, being a co-principal in the obligation, he remained liable, though time had been given to the other obligant. In another case ³, it has been held, that giving time to an acceptor, after action brought against him, would not discharge the drawer and indorsers.

It has been decided, that the holder, after payment was refused by the acceptor, and all the proper steps of negotiation taken in consequence, did not discharge the drawer by offering to retain the bill a few days longer, in the prospect of still getting payment from the acceptor ⁴. In another case ⁵, where the holder of a bill, after it had been protested for non-payment and due notice given, proposed, through his attorney, to give time to the acceptor, on receiving a certain payment,

¹ *Per* Abbott, C. J., in *Jay v. Warren*, 1 C. and Pay. 532, *per* the Court of K. B. in *Lee v. Levi*, id. 532, 554, 4 B. and Cress. 390.

² *Price v. Edmonds*, 10 B. and Cr. 578.

³ *Pike v. Sweet*, 1 Dans. and Ll. 159.

⁴ *Forster v. Jurdieson*, 16 East. 105.

⁵ *Badnall v. Samuel*, 3 Price, 521.

which, however, was not made, so that the proposal did not take effect, and there were merely some partial payments made unconditionally, it was found to afford no ground for discharging an indorser, that he had got no notice of this proposal, with what followed on it, or of the ultimate non-payment of the balance.

No objection can be made on any of the grounds now stated, if the objector has given his assent to the indulgence. For instance ¹, where the holder of a bill asked the indorser's consent to give the acceptor time to pay it by instalments, and the indorser answered that he might do as he liked, since he (the indorser) was discharged for want of notice of non-payment, it was afterwards found, on the notice being held sufficient, that these expressions implied a consent by the indorser that the holder should give time to the acceptor. Perhaps it may be doubted whether such consent was sufficiently indicated. It has been farther decided, that even a subsequent promise to pay, after knowing that time had been given, excludes the objection. Thus ², where the drawer of a bill defended himself against an action by the indorsee, on the ground that the latter had repeatedly given time to the acceptor, it was held to be a good answer, that the defendant, after hearing that time had been so given, said to the plaintiff, "I know I am liable, and if Jones" (the acceptor) "does not pay, I will." The principle seems to have been here adopted as to the plea of indulgence, which was already explained regarding want of notice, viz. that it afforded only a personal objection, which the party renounced by a subsequent promise of payment. In another case ³, it seems to have been held at *Nisi Prius*, that the drawer of a bill was barred from objecting that time had been given to the acceptor, by a paper which he had promised to sign, consenting to the holder using any means that he could to recover payment from the acceptor, without prejudice to his rights against him, (the drawer). But ⁴, where the holder of a bill had taken another bill instead of it from the acceptor, which was never satisfied,

¹ *Clark v. Devlin*, 3 Bos. and Pull. 365.

² *Stevens v. Lynch*, 12 East. 38.

³ *Hill v. Johnson*, 3 C. and P. 1417.

⁴ *Withall v. Masterman*, 2 Campb. 179, *per* Lord Ellenborough.

and his indorser, to whom the acceptor mentioned that he had taken up the old bill by a new one, answered that it was the best thing which could be done, it was held that such a remark did not preclude the indorser, in a question between him and the holder, from pleading the indulgence given to the acceptor, as his remark was presumed to refer to the advantage of the arrangement to the acceptor, and not to imply a ratification of it as to the holder.

3. Effect of discharge or giving time in accommodation-bills and notes.

What has been now stated assumes that the subsequent parties to a bill or note have recourse against the prior party who has got a release, or received indulgence from the holder, and that their recourse is presumed to have been thereby injured. But, when they have no such recourse, though entitled to it *ex facie* of the bill or note, they cannot plead that they are released, because the presumption of injury is then done away. For instance, the drawer of a bill accepted merely for his accommodation, and without effects of his in the acceptor's hands, cannot plead that he is discharged by the holder giving time to the acceptor¹. It has been also found, that such a proceeding by the holder affords no objection against his proving for such a bill on the drawer's estate². In another case, where the defendants had, to pay the plaintiffs for the price of goods, drawn a bill in their favour on their own agent in London, who, though he accepted the bill, did not pay it when due, as he had not then cash belonging to his constituents, but only goods, which he could not sell, it was found that the plaintiffs did not discharge the defendants by allowing him twice to renew the bill without notice to them, (although he at last failed, with funds of theirs more than sufficient to pay the bill,) seeing that such renewal was in their favour, because he had no funds when the bill became due, and was therefore truly a surety for them³. Nor can such objections be pleaded by a subsequent indorser for whose accommodation a bill or note

¹ *Per* Lord Ellenborough in *Collot v. Haigh*, stated *antea*, 393, note 1.

² *Per* Lord Chancellor Eldon in *ex parte Holden*; *Cooke's Bankrupt Law*, 167.

³ *Per* Lord Ellenborough in *Clark v. Noel*, 3 Campb. 441. His Lordship's opinion was afterwards affirmed by the Court of King's Bench.

has been accepted or granted, though release or indulgence be given to a prior party. The same rules are applicable on this subject which have been explained as to notice or negotiation in similar cases¹.

But it does not follow, that because parties who are principal debtors *ex facie* of a bill or note may be sureties as to other parties, the holder therefore loses his claim against them as principal debtors, by giving indulgence to the parties for whose accommodation they are bound; for example, that the holder of a bill or note accepted or granted for behoof of the payee, forfeits his claim against the acceptor or granter, by giving indulgence, or a discharge, without his consent, to the payee. *1st*, There is no ground for such a doctrine, if he is not aware of the true nature of the bill or note; because he is then only bound to look at the relations of the several parties as they appear *ex facie* of it². Even in England, it must be proved that his knowledge of these relations was different from what they appeared to be³; and, in Scotland, no evidence would probably be admitted to redargue that arising from the bill, excepting his writ or oath. But, *2dly*, It appears to be now settled, that, although the payee should know the relative situation of parties *inter se*, he is entitled to rely on their characters as they appear *ex facie* of the bill or note, and, therefore, preserves his claim at all times against the acceptor or maker as principal debtor, whether he has given indulgence or not to the other parties

¹ *Antea*, 517, *et seq.*

² In *Carstairs v. Rolleston*, 5 Taunt. 551, 1 Marsh. 207, the holder of a note granted for the payee's accommodation was held not to have discharged the maker by releasing the payee, it not being proved that the holder knew that the note was granted for the payee's accommodation. In *Dingwall v. Dunster*, 1 Doug. 247, the holder of an accommodation-bill, who knew only *after it became due* that it was accepted for the drawer's accommodation, was found not to have discharged the acceptor by applying first to the drawer, and allowing several years to elapse before he asked the acceptor. But, *1st*, He did not expressly agree to give time to the drawer; and, *2dly*, As he did not know of the accommodation at the time of taking it, he could not be bound to observe any rules of negotiation but such as arose from the relative situations of the parties as appearing *ex facie* of the bill. The general rule laid down on this subject in *Ellis v. Gallindo*, cited in a note to 1 Doug. 249, is said to have been the same, although the circumstances of the case led to a different decision.

³ *Vide* preceding note.

for whose accommodation he became bound. Accordingly ¹, where the holder of a note, knowing that it was granted for the payee's accommodation, had become bound, on receiving a composition from the payee, not to molest him, it was decided, notwithstanding, that he had not thereby lost his claim against the maker. The same doctrine, as already shewn ², although at one time doubted, has been settled, regarding the holder's claim against the acceptor of an accommodation-bill, though he has given time to other parties on the bill who were liable in relief to the acceptor. In like manner, his releasing or giving indulgence to a subsequent indorser would not cut off his claim against a prior one, although he should be aware that the former, as the party accommodated, was liable in recourse to the latter. In all these cases, the claim of recourse does not arise on the face of the bill or note, but from an agreement independent of it. But the *holder's* claim arises from the bill or note alone, and, therefore, though he should discharge *this* claim, or give time for the payment of it, he will not thereby discharge or fetter any other party as to the time of enforcing a distinct claim of recourse, independent of the bill or note ³.

¹ *Mallet v. Thomson*, *antea*, 365, note 1. The same doctrine seems to be implied as to the effect of releasing the indorser of bills on a composition-contract, in not discharging an accommodation-acceptor, in *Maltby v. Carstairs*, 7 B. and Cr. 735. *Vide* also *Price v. Edmonds*, 1 B. and Cr. 578. The doctrine was also recognised in Scotland in *Mowbray v. White*, 3 S. and D. 146, where it was decided that the pursuer had a good claim against the acceptor of an accommodation-bill which he had retired, and for which the acceptor had also given him a separate obligation, although he had taken a bill from the drawer for part of the same debt, still, however, retaining the original bill and the acceptor's obligation.

² *Antea*, 365, &c.

³ *Vide* Lord Ellenborough's opinion in *Mallet v. Thomson*.

CHAPTER VII.

OF ACTION AND DILIGENCE ON BILLS AND NOTES, CHECKS FROM BANKERS, BANK NOTES, AND BANKERS' NOTES.

BILLS and notes, like other obligations, form in Scotland the ground of a personal action at common law. But statute has also established a summary mode of execution to enforce payment of them, without an action; and this statutory process is applicable to almost every case of bills and notes. It will be proper, before detailing the nature and requisites either of this summary process or of procedure by action, to distinguish the cases which fall under each respectively, after describing the leading features of the summary process.

This process was first introduced as to foreign bills. By the act 1681, c. 20, which proceeds on the narrative, “ How necessary it is for the flourishing of trade, that bills or letters of exchange be duly paid, and have ready execution, conform to the custom of other parts ;” it is enacted, “ That, in case of any foreign bill of exchange, from or to this realm, duly protested for not acceptance or for not payment, the said protest having the bill of exchange prefixed, shall be registrable within six months after the date of the said bill, in case of non-acceptance, or after the falling due thereof in case of non-payment, in the books of Council and Session, or other competent judicatures, at the instance of the person to whom the same is made payable, or his order, either against the drawer or indorser in case of a protest for non-acceptance, or against the acceptor in case of a protest for non-payment, to the effect it may have the authority of the judges thereof interponed thereto, that letters of horning upon a simple charge of six days, and executorials necessary, may pass thereupon, for the

“ whole sums contained in the bill, as well exchange as principal, in form as effeirs, sicklike and in the same manner as upon registrate bonds, or decreets of registration, proceeding upon consent of parties ; providing always, that, if the saids protests be not duly registered within six months, in manner above provided, then, and in that case, the said bills and protests are not to have summary execution, but only to be pursued by way of ordinary action, as accords ; and farther, that the sums contained in all bills of exchange bear annualrent, in case of not acceptance, from the date thereof, and, in case of acceptance and not payment, from the day of their falling due, ay and while (until) the payment thereof.” It is also declared, That, notwithstanding of the foresaid summary “ execution provided to follow upon bills of exchange, for the sums therein contained, in manner above specified, yet it shall be leasom (lawful) to the party charger to pursue for the exchange, if not contained in the said bills, with re-exchange, damage, interest, and all expenses, before the ordinary judge, or, in case of suspension, to eik (add) the same to the charge at the discussing of the said suspension, to the effect that the same may be liquidat, and decret given therefor, either against the party principal, or against him and his cautioners, as accords.”

The act 1696, c. 36, referring to this statute, enacts, “ That the same execution shall be competent, and proceed upon inland bills or precepts, as is provided to pass upon foreign bills of exchange, by the 20th act of the 3d Parliament of Charles II., holden *in anno* 1681, which act is hereby extended to inland bills and precepts in all points.”

These two acts, the first relating to foreign, and the second to inland bills, authorise summary execution, 1st, Against the drawer and indorsers on non-acceptance ; and, 2dly, Against the acceptor on non-payment. In the first of these cases, summary diligence is allowed, after registering the protest, at any time within six months after the date of the bill, whether before or after the term of payment. Accordingly, in the case¹ of a bill dated 10th March 1795, and payable 90 days after date, or on 11th June, but of which

¹ Cowan v. Kay, 20th June 1795, Morr. 1621.

acceptance was refused on 28th March, the Court sustained a charge of horning given to the drawer on 28th May. In this case the same rule was enforced, agreeably to the statute, regarding summary diligence, which has been laid down¹ regarding the holder's right at common law to bring an immediate action against the drawer or indorsers on non-acceptance.

Summary diligence was not competent, by these acts, on non-payment, unless against the acceptor; and there was no recourse, in such a case, against the drawer and indorsers, but by action. But the act 12 Geo. III. c. 72, § 42, made perpetual on this subject by 23 Geo. III. c. 18, § 55, remedied both this and another defect, by allowing the like remedies on promissory-notes as on bills, and by enacting that there should be summary execution against the drawers and indorsers of bills and the indorsers of notes, for non-payment as well as for non-acceptance. As to promissory-notes, it enacts, that "the same diligence and execution shall be competent, "and shall proceed upon promissory-notes, whether holograph "or not, as is provided to pass upon bills of exchange and inland bills, by the law of Scotland; and that promissory-notes shall bear interest as bills." The rest of the clause, which confers on such notes the same privileges as on bills, has been already discussed². As to summary execution, in case of non-payment, against drawers and indorsers, the same statute enacts, that "summary execution, by horning or other "diligence, shall pass upon bills, whether foreign or inland, "and whether accepted or protested for non-acceptance, and "upon all promissory-notes duly negotiated not only against "the acceptors of such bills, or granters of such notes, but "also against the drawers of such bills, and the whole indorsers of the said bills and notes jointly and severally, excepting where the indorsation is qualified to be without recourse, "saving and reserving to the drawers or indorsers their respective claims of recourse against each other, and all defences against the same, according to law." According to this clause, summary execution on non-payment is competent against the drawer and indorsers of a bill and the indorsers of

¹ *Antea*, 162.

² *Antea*, 3.

a note, as well as against the acceptor or granter, all at the same time.

It is proper to point out the cases in which summary execution is, or is not, competent by these statutes. *1st*, It is not competent, either on non-acceptance or non-payment, unless the instrument of protest for non-acceptance or non-payment has been completed and registered in the books of some competent court within six months, viz. the protest for non-acceptance in six months after the date of the bill, and the protest for non-payment in six months after the term of payment of the bill or note. It has been shewn¹, that the holder of a bill payable at a certain date may preserve his recourse against the drawer and indorsers, by presenting it for payment when it falls due, and protesting it for non-payment only, although not accepted. His right in such a case, to summary execution against the drawer and indorsers, depends on the terms of the statutes ; but these must be interpreted with reference to the rules of common law. On this subject, the act 1681, c. 20, enacts, that a protest for non-acceptance shall be registered within six months after the date of the bill, to authorise summary execution against the drawer or indorsers, and that, “ if the said protests be not duly registered within six “ months, *in manner above provided*,” there shall be only an ordinary action on the bill. The act 12 Geo. III. c. 72, likewise supposes, in the event of bills not being accepted, that there is a protest for non-acceptance. This, however, though assumed to be the practice, is not expressly required by the statute, where it is not intended to have recourse against the drawer and indorsers for non-acceptance, but merely for non-payment, and, as a protest for non-payment is alone necessary, in that case, at common law, it would seem that the statute, in allowing such recourse to be enforced by summary diligence, does not go beyond the common law, or render necessary for that purpose the taking and registration of more than a protest for non-acceptance. In one early case of non-acceptance², it is said to have been decided, that a protest for non-payment, registered within six months after the term of payment, was

¹ *Antea*, 409.

² *Yuill v. Richardson*, 25th July 1699, *Foxes*, 134.

sufficient to authorise diligence against the drawer. But the principle of this decision is not explained; and it is not easy to perceive its principle under the statutes then subsisting, which allowed summary diligence only against the acceptor for non-payment. But the question now stated must be decided by the statute 12 Geo. III. c. 72, § 41, as combined with the previous statutes, and the rules of common law.

If the protest for non-acceptance or non-payment is not registered within the time and in the manner prescribed by the statutes, there can be no recourse either against the drawer, indorsers, or acceptor, except by means of an ordinary action. But, in some cases ¹, where summary diligence on bills was suspended, on the ground that the bill had not been protested till after the six months, or on the ground of nullity in the diligence, the charge was notwithstanding converted into a libel. This cannot, however, be done, where the charge proceeds on a protest null under the stamp laws ², or where the bill is vitiated ³, or where the bill is for a sum below £.25, which could not be sued for in the Court of Session ⁴, or after the record has been closed in a suspension ⁵.

2*d*, Summary execution is competent only for the amount of the bill or note, with interest from its date in case of non-acceptance, or from the term of payment in case of non-payment, as also for exchange, or any other sum, if specified in the bill. But such a claim, whether for exchange, re-exchange, damages, interest, or expenses, when not specified in the bill, can be recovered only by ordinary action, or, if the diligence is suspended, by being included with the other sums charged for, and thus made the subject of discussion in the suspension.

¹ *M'Cready v. Crawford*, 23d July 1712, *Morr.* 11984; *Gordon v. Milne and Coy.*, 13th Feb. 1822; *Reid v. Fraser*, 4th Feb. 1825, *F. C.*; *Douglas v. Smith*, 9th Feb. 1830, 8 *S. D. B.* 873.

² *Corrie v. Barbour*, 20th Dec. 1827, 6 *S. and D.* 268, *F. C.*

³ *Fleming v. Leiper and Scott*, 1st July 1823, 2 *S. and D.* 446; *M'Ara v. Watson*, 2 *S. and D.* 360; *Forrest*, 13th June 1834, 12 *S. D. B.* 726.

⁴ *Forrest*, 13th June 1834, 12 *S. D. B.* 726.

⁵ *Campbell v. M'Donnell*, 22d Dec. 1827, 5 *S. and D.* 412, confirmed by the Second Division, in *Watts v. Barbour*, reported verbally by Lord Cringletie, in July 1828, 6 *S. D. B.* 1048.

3d, It has been shewn, that summary execution is not competent on bills or notes, which, though the party's name be inserted by himself in the body of them, are not subscribed by him¹, or which are subscribed only by initials², or by a mark³. The subscription of one notary and two witnesses has been held a sufficient substitute for the party's signature. But it is doubtful whether a bill or note thus subscribed could form the ground of summary diligence. Such diligence appears to be admissible only when the document is probative in itself, and not when it requires extrinsic proof, which cannot be adduced except in an action. A subscription by two notaries and four witnesses probably would form the ground of summary diligence; because it is probative *per se*. The signature of a person *per* procuration of another would also form the ground of summary diligence, when the procuration is notorious, as when the procurator has acted as such in a long course of transactions, or when a partner has an implied power from his copartners to bind them, by subscribing the company firm⁴. The principal is then identified, in the mind of contracting parties, with his agent⁵, and may be considered as signing through him. The notoriety, too, of the agency appears to come in place of extrinsic proof, at least so as to afford a warrant in the first place for summary diligence. But, if partnership is denied, it must be proved, and the person against whom diligence is raised may then suspend without caution; as he ought not to be bound even to find security for the debts of a company with which he is not proved to have any concern⁶.

Summary diligence would not probably be allowed on a signature by procuration, where the agent's power depended solely on a written procuration, seeing extrinsic proof is here

¹ *Antea*, 43.

² *Antea*, 47.

³ *Antea*, 51-2. *Vide* cases there referred to, and, *inter alia*, *M'Intosh v. M'Donald*, 8th Dec. 1828, 7 S. and D. 155.

⁴ *Vide* *Thomson v. Liddel and Co.*, 2d July 1812, F. C. *post*.

⁵ *Antea*, 222, note 1.

⁶ In *Anderson v. Bolton and Barker*, 26th Jan. 1810, F. C., this decision was pronounced as to the suspension of a charge given to the suspender as partner of a company, with which he denied that he had any concern. A similar decision was given in *Carlier v. Davidson*, 30th June 1810, mentioned in a note to the preceding case.

necessary to make the subscription valid. It was decided in one case by a Lord Ordinary, though the matter did not come before the whole Court, that the subscription of a father's name by his son, who was said to have been in the habit of so subscribing, did not form a ground for summary diligence against the father¹. In another case², a charge was suspended, when given to a mother on a bill thus subscribed in her name by her daughter. But the Court appear to have there held, that there was no mandate, either special, or by any course of dealing in which the mother had sanctioned this mode of subscription. In another case³, the point was raised but not decided, it being held that the objection to summary diligence on a bill signed by procuration was excluded by the circumstance of the suspender having in his suspension waived all such objections.

When a bill is vitiated *ex facie*, or the suspender's signature is proved *instante* to be forged, a suspension of a charge on it will be passed without caution or consignation. Thus⁴, where a bill was vitiated in the date, the Court passed a suspension without caution or consignation. Again⁵, a suspension of a charge on a bill was passed without caution or consignation, on a report by a banker and engraver, that the year of payment had been erased or altered. In another case⁶, the Court remitted to engravers to investigate the charge of forgery *comparatione literarum*, with writings acknowledged to be genuine. Again⁷, engravers having reported that the suspender's signature was forged, they passed the suspension without caution or consignation.

In a case⁸, where a charge was given to a party described as James Wilson, "farmer at Shields," on a note drawn payable to "James Wilson," and indorsed also "James Wilson," without a designation, the First Division of the Court, in a

¹ *Per* Lord Alloway in *Sneddon v. Brown*.

² *Lowson v. Matthew*, *ante*, 222, note 3.

³ *M'Intosh v. M'Donald*, 9th Dec. 1828, 7 S. and D. 155.

⁴ *Corrie v. Barbour*, 26th Nov. 1825, 4 S. D. B.

⁵ *Hamilton v. Kinnear and Son*, 17th June 1825, 4 S. and D. 102.

⁶ *Herbertson*, 1825.

⁷ *Wilson v. Hart*, 25th Feb. 1826, 4 Shaw and D. 504.

⁸ *Wilson v. Mitchell*, 9th Feb. 1827, 5 S. and D. 318.

suspension, by the party charged, wherein he produced notes with his genuine signature, which appeared to be different from that in the note charged on, suspended the charge *simpliciter*, proceeding, however, on the ground, that, as there was no designation on the face of the bill, the notary had no warrant for charging this individual James Wilson for payment of it. It is understood that a different doctrine was held in another case ¹ by the majority of the Second Division.

Where a bill was addressed to A. and J. Dougal and Co., and accepted by the suspenders under that description, the Court refused a suspension, which proceeded on the ground, that they never traded under the firm of A. and J. Dougal and Co., but only under that of A. and J. Dougal, holding that they had adopted the former description by adhibiting it to the bill ². But in the same case, they had refused the suspender a diligence in the Bill-Chamber, to recover other bills which might be compared with his alleged signature, holding, it would seem, that the forgery must either be established *instantly*, so as to warrant passing the bill without caution, or that it must be investigated, like other disputed allegations, after passing the bill in the ordinary form, on caution or consignment. In another case ³, the Court passed a suspension of a charge in a bill without caution or consignment, being satisfied of the forgery of the suspender's (or indorser's) signature, by comparing it with genuine signatures of his. The same decision was given afterwards on the same grounds, in other cases ⁴.

4th, It has been explained ⁵, that even a written promise to accept a bill, distinct from the bill, is not in Scotland considered as an acceptance, and cannot even form the ground of an action as such, although an action may be raised on it as a separate obligation, adducing the bill *in modum probationis*. Much less, therefore, can it form the ground of summary diligence.

¹ Herbertson, Feb. 1826.

² Dougals v. Robin, 8th Feb. 1828, 6 Shaw and D. 504.

³ Paterson v. Mitchell, 25th Nov. 1826, 5 S. and D. 43.

⁴ Henderson v. M'Artney, 26th Jan. 1828, 6 S. and D. 460; Ross v. Millar and Baird, 2d Dec. 1831, 10 S. D. B. 95.

⁵ *Antea*, 444. This point is illustrated by a case, Maxwell v. M'Kay, 12th July 1699, noticed by Forbes, 140.

5th, It has been stated¹, that drafts on bankers, if dishonoured, would not warrant summary diligence against the drawer, though an ordinary action may be raised on them. None of the statutes authorising summary diligence apply to such drafts *nominatim*, and they cannot be considered as bills, since they are not drawn, like bills, to be accepted, but for immediate payment. The reasons, however, which render summary diligence on bills and notes expedient, apply still more to them.

6th, When a bill or note is lost, summary diligence is not competent on it. But it may be recovered by an action. Some account of the procedure applicable to such a case has been already given².

7th, When a foreign bill is drawn in parts, one of which is subscribed by certain obligants, and one by others, summary diligence appears to be competent at the holder's instance against the whole, since the different parts are supplemental of each other, and constitute one obligation.

The respective subjects of summary diligence and of action being thus defined, we shall now discuss the nature and requisites of each respectively; in doing which we shall consider,

1. By whom diligence or action on a bill, note, or draft may be raised;
2. The course of procedure in following out such diligence or action, especially the former;
3. The claims against the several parties to bills, notes or drafts, recoverable by diligence or action;
4. What proof is required in support of these claims, or is competent in defence against them; and how it is to be led.

¹ *Antea*, 191, note 4.

² *Antea*, 321, *at seq.*

SECTION I.

Diligence or Action,—by whom ?

1. Action or diligence may be raised by the payee or his order ¹. It is not competent, except in the case of the drawer, (to be immediately noticed,) to any but the holder of a bill or note payable to the bearer, or blank indorsed, or wherein he or the company to which he belongs is named as payee or special indorsee, or where the bill or note has been conveyed to him by assignation from the party who is in right to it, accompanied by the document, or where he has married the person in right to it, in which case he acquires it *jure mariti* ². How far or in what manner a husband may use summary diligence on bills or notes payable to his wife, has been already considered ³. When a bill, note or draft is made payable to one person for another, the former only can maintain action or diligence on it ⁴; being liable in accounting to the latter. The right of raising action or diligence *against* a party on a bill or note subscribed by another person *per* procuration from him, has been already considered ⁵.

If a person appears *ex facie* of a bill or note to have sole right to it, it will be no defence against action or diligence by him, that he appears *aliunde* to have given only partial value for it. This, if proved by his writ or oath, may subject him to exceptions pleadable against his indorser. But, to warrant action and diligence by him, it is enough that he is *in titulo* of the bill or note, and can discharge it, and any transaction, proved by extrinsic evidence, between him and another party, is unavailable, as *res inter alios acta* ⁶.

¹ 1681, c. 20.² *Antea*, 213-4.³ *Ibid.*⁴ *Antea*, 370.⁵ *Antea*, 554-5.

⁶ It was probably on this ground that Lord Kenyon laid it down, in *Wiffen v. Roberts*, 1 Esp. 261, "that where a bill of exchange is given for money really due from the drawee to the drawer, or is drawn in the regular course of business, the indorsee, though he has not given to the indorser the full amount of the bill, yet may recover the whole, and be the holder of the over-plus above the sum he has really paid, to the use of the indorser." In accommodation-bills, if it is proved by writ or oath that he gave no value for

It is said that action or diligence might legally proceed in name of a company for any debt due to them ¹. But this doctrine cannot be adopted without limitation ². On the one hand, it has been held, that a society or company, whether constituted for trading purposes or not, if not incorporated by charter, has no right at common law to sue under a general descriptive denomination ³. It is said, that either the whole individuals composing the company must be named, or at least the directors or committee, who by the constitution of the company represent them ⁴; and this opinion has been supported by the decisions pronounced in several cases, where the instance of a company suing or raising diligence under a descriptive name has been sustained, when the company was joined to individuals, suing or using diligence as partners or managers, or where it has been held competent to sue or use diligence against them ⁵. But it has been decided, that an unchartered company, assuming a general descriptive appellation merely as that by which they wish to be known, cannot sue under it ⁶. On the other hand, it has been held, that bills or notes granted by ⁷ or to ⁸ individuals, though descri-

them, and that his indorser was the person accommodated, neither this indorser nor his indorsee can recover upon them.

¹ 2 Bell, 619.

² Ibid.

³ *Lodge of Lanark v. Hamilton and others*, 11th June 1730, *Morr.* 14554; *Crawford v. Mitchell*, 13th June 1761, and *Wilson and others v. Jobson*, 13th Dec. 1771, *Morr.* 14555; *Culcreuch Cotton Company v. Mathie*, 27th Nov. 1822, 2 *Shaw*, 47; *Wilson and others v. Kippen and others*, 7th June 1823, 2 *S. and D.* 378.

⁴ 2 Bell, 629.

⁵ To this effect were the cases of the *Sea Insurance Company*, 17th Feb. 1827, 5 *S. and D.* 375; affirmed on the merits, 18th Feb. 1830, 3 *W. S.* 17, and *Commercial Banking Company*, 28th July 1828, 3 *W. S.* 357, in both of which cases the company were defenders; and *Fisher*, 7th Dec. 1827, 6 *S. and D.* 216, and *Cheyne*, 2. Dec. 1828, 7 *S. D.* 110, where they were chargers or pursuers.

⁶ This was decided in the case of the "*Culcreuch Cotton Company*," note 2, as to an action brought by them under that name. The same doctrine was adopted by the House of Lords, though under the modification already stated in the case of the *Commercial Banking Company*, note 4.

⁷ *Ross v. Young and Lauder*, 14th Jan. 1831, 9 *S. D. B.* 375.

⁸ *Leslie v. Sproat*, 24th Jan. 1829, 7 *S. and D.* 312. A suspension, however, of a charge on a promissory-note to John Dore for the *Fleishers of Canon-gate*, was lately passed on caution, upon an objection to his title, in respect that this body was not a legal corporation; *Trotter v. Dore*, 3d Dec. 1833, 12 *S. D. B.* 161.

bed as the office-bearers of an unincorporated society, are valid, as obligations by or titles to the individuals. If a firm is that under which the company has been in the habit of signing obligations and transacting all their business, it would appear that they are also entitled to sue or use diligence, and are liable to action or diligence under it. Each individual partner is bound by an obligation subscribed under that firm, because each partner is held to have given to every other partner a mandate to bind him by subscribing it; and the firm is held to represent the names of the individual partners, as much as if every name had been specially subscribed. Accordingly, where a house abroad drew a bill on a house in this country, which was dishonoured, the drawees, being partners of the foreign house, were found liable in that character to summary diligence, as drawers¹. But, if a firm is known to the public as that used in obligations contracted by the company, and therefore forms a ground of action or diligence against the company or its partners, the company must also have the benefit of such public knowledge, by being entitled to sue for debts under the firm, since those who contract obligations to them must be presumed to know the firm as well as those who take obligations from them. This distinction, accordingly, appears to have been recognised in a case already cited², and has been established in a recent case³, to the effect of holding, that a trading company may sue or use diligence, and is liable to action or diligence under the firm by which

¹ Thomson v. Liddel and Co., 2d July 1812, F. C.

² Culcreuch Cotton Company v. Mathie, *ante*, 559, note 2, where it is said to have been held, "that there was a clear distinction between the case where "a mercantile company sued under its proper firm, by which it granted obligations, (as Douglas, Heron and Company, or the like); and where it sued "under a mere descriptive name or denomination, as in the present case."

³ Forsyth v. Hare and Co., 18th Nov. 1834, 13 S. D. B. 42. In this case the opinions of the whole Court were expressed to the effect stated in the text. It was the case of action and diligence against a company. But the opinions expressed were also quite explicit as to the opposite case of action or diligence raised by a company. This case was very deliberately and fully canvassed in consequence of an opposite judgment which had been pronounced before in the case of John Aitchison and Co., 4th Feb. 1832, 10 S. D. 396, but which must now be held as overruled. The opinions of the Judges give a full history of the law and practice on the subject, and of the course of decisions with regard to it.

they subscribe bonds or bills, and contract other obligations, without a specification of their individual partners.

As the subscription of a bill by the firm of a company authorises diligence *against* the individual partners, so it appears competent to raise diligence or action *in name* of the individual partners on a bill made payable to the firm ; provided the fact of their being partners is not disputed, as the firm is, in that case, intended to represent them, as much as if their names were inserted in it. But, if partnership is denied, either when diligence or action is raised in their names or against them, it must be proved by the party alleging it ; and, in the latter case ¹, the person against whom diligence is raised will be entitled to have a suspension of it passed without caution.

It was probably in consequence of the number of questions which had been raised in Scotland regarding the title of companies to sue or be sued under their social firm, that the Legislature, (after a temporary statute to the same effect, 6 G. IV. c. 131, with regard to joint stock companies generally, which expired,) enacted, by 7 G. IV. c. 67, for the benefit of societies carrying on the business of banking in Scotland by joint stocks, the shares of which were transferable, that it should be “lawful for every such joint stock society or co-
“partnership, already established, or that may hereafter be
“established in Scotland for the purposes of banking, to sue
“and be sued in the name of the manager, cashier, or other
“principal officer of such society or copartnership, provided
“that such joint stock society or copartnership” observed the regulations therein prescribed. The principal regulation established is, (§ 2 and 3,) that every such existing society or copartnership, between 25th May and 25th July, in that and each succeeding year, and every such future society, before they begin business, and between 25th May and 25th July, in each succeeding year, should cause an account or return to be made out, according to a form prescribed, (the account or return to be made out by the bank’s manager, or other principal

¹ Anderson v. Bolton and Barker, 26th Jan. 1810 ; Carlier v. Davidson, 30th June 1810, F. C.

officer already mentioned, and verified by him on oath before a justice of peace duly qualified, and delivered by him between 25th May and 25th July each year to the Head Collector of Stamp Duties in Edinburgh, as particularly set forth in the act,) “wherein shall be set forth the true names, “titles or firm of such intended or existing society or copartnership; and also the names and places of abode of all “the members of such society, or of all the partners concerned or engaged in such copartnership, as the same shall “respectively appear on the books of such society or copartnership, and the name or firm of every bank or banks established or to be established by such society or copartnership; and also the name and place of abode of the manager, cashier or other principal officer in the name of whom “such society shall sue and be sued, as herein after provided; “and also the name of every town and place where any of “the bills or notes of such society or copartnership shall be “issued by any such society or copartnership, or by their “agent or agents.” It is also declared, § 4, that a copy of such return, to be filed in manner required by the statute, and certified to be a true copy by the Head Collector or Comptroller of Stamp Duties at Edinburgh, shall, in all proceedings, civil and criminal, and in all cases whatever, “be “received in evidence as proof of the appointment and authority of the officer named in such account or return, and “also of the fact, that all persons named therein as members “of such society or copartnership were members thereof at “the date of such account or return.” Provision is made (§ 6,) for additional returns “of the name of any person “who shall have been nominated or appointed a new or additional officer of such society or copartnership, in whose “name the same shall sue or be sued;” and also of the names of any partners who have withdrawn from, or been added to the copartnership. The statute then enacts, (§ 7,) that all actions and suits, proceedings in bankruptcy, or any other proceedings in law or equity against any debtors of such copartnership, or against any persons, bodies politic or corporate, or others, whether members of the copartnership or not, relative to the concerns thereof, may be instituted and prosecuted “in the name of the officer named as aforesaid, for the

"time being of such copartnership, as the nominal pursuer, plaintiff or petitioner, for or on behalf of such copartnership;" and that all actions or suits, or proceedings at law or equity, whether by members of the copartnership or others, against such copartnership, shall and lawfully may be commenced, instituted and prosecuted against the officer for the time being of such copartnership, as the nominal defender or defendant, for or on behalf of such copartnership;" and that "the death, resignation, or removal, or any act of such officer, shall not abate or prejudice any such action, suit," &c. Similar provisions are made as to criminal prosecutions by or on behalf of the company. There are likewise provisions, (§ 8, 9, 10,) for enforcing against the property of the copartnership, or the persons and property of the individual members thereof, decrees obtained against the officers of the copartnership. But it is enacted, (§ 12,) that no provision of this statute shall affect processes depending at the date of it.

It has been decided, under this statute, that a bank which subsists only to the effect of winding up its business, is entitled to raise and prosecute diligence or action in name of its cashier ¹.

It has been decided in England, (and seems to be law also in Scotland,) that when a bill is payable to a firm consisting of two names, both names must be joined in an action for payment, since the contract has been made with both ². Nor is it enough that one of them has no interest, unless he has renounced his interest to the other *ex facie* of the bill; for otherwise the debtor cannot be discharged without him.

It has been held in England, and also in Scotland ³, that an action may be raised on a bill or note, either by the last indorsee or some previous holder, (including the drawer, if the bill has been at first payable to him,) provided he has first scored his own and all the subsequent indorsations ⁴.

¹ Cheyne, 26th Nov. 1828, 7 S. D. 60; Drummond, 18th Jan. 1831, 9 S. D. B. 284.

² Guidon v. Robson, 2 Camp. 302, *per* Lord Ellenborough.

³ *Antea*, 266.

⁴ *Antea*, 266, note 3; and *per* Eyre, C. J., in *Walwyn v. St Quintin*, 1 Bos. and Pull. 658.

In a recent English case ¹, an indorsation subsequent to that on which the plaintiff sued, was allowed to be struck out, by handing back the bill for that purpose, after the plaintiff's case had closed. But neither drawer, payee, or any prior indorser, can be re-invested by scoring the subsequent indorsations, when there is a receipt on the bill for its amount in favour of another indorser ²; for this receipt cannot be scored like an indorsation. Each indorsation is a separate draft, and therefore a party may hold the bill or note by virtue of one indorsation, though the rest should be scored out. But the receipt proves payment, and stops negotiability.

When a person who has been in right to a bill or note, whether as payee or indorsee, pays its amount to a posterior indorsee, and his payment is acknowledged by a receipt, he has a claim of relief against all the previous parties. In one case ³, where the drawer and indorser of one bill, payable to the drawer, and the indorser of another, had paid the amount of the former bill to a later indorser, and taken a receipt on the protest, (the indorsation subsequent to his being scored,) and had also paid the amount of the latter bill, on a receipt upon the protest, to a party who had previously paid it for the honour of an indorser, the Court, on an application, allowed the protests to be recorded, and summary diligence to proceed in his name, although they had been taken in name of other parties. This decision was probably founded on the acts 1681 and 1696, which allow diligence by the payee, "or his order," in whatever name the protest is taken. Any person, therefore, who has been once in right to the bill, may use diligence on it as the payee's order, though he has afterwards indorsed it away, provided it appears, by a receipt to him for its amount or otherwise, that he has again acquired right to it. In a case ⁴, where a merchant in London, to

¹ *Mayer v. Jadis*, 1 M. and Rob. 247.

² *Russell v. Mather*, 27th Jan. 1824, 2 S. and D. 648, F. C. In England, in *Graves v. Key*, 3 B. and Ad. 313, it was held that a receipt on the back of the bill might be explained or contradicted by parole evidence, and that evidence proving that the bill had not been paid on the acceptor's account, it was held to be still negotiable. In Scotland, parole evidence would not have been admitted for this purpose.

³ *Herries*, Petitioner, 5th Jan. 1745, *Morr.* 1509.

⁴ *Stewart v. Foggo*, 2d Dec. 1766, *Morr.* 8136. In this case it was farther pleaded, that as the indorser had at least got possession of the acceptor's goods

whom a bill had been indorsed "for value in account," protested it in his own name, and returned it to the indorser, who charged the acceptor and executed a pointing, after he heard that the indorsee had died before the date of the charge, the Court decided that the proceedings were null. It was urged for them unsuccessfully, that, when a bill was indorsed "for value in account," the substantial interest remained in the indorser; but it was not urged, that the diligence might proceed in an indorser's name, though the protest had been taken in name of the indorsee. Yet this doctrine seems warranted by the acts 1681 and 1696, and by the decision first quoted. But if such a right existed under these statutes, the subsequent act 12 Geo. III. c. 72, though probably meant to extend it, does, in words, appear to restrict it. It enacts, that summary execution "shall be competent to *the indorsee* of a bill, although the protest is not in name of the indorsee craving the diligence, and although the bill is not re-conveyed to him by indorsation, if he produces a receipt for the value by act of honour, or a missive letter from the protesting indorsee mentioning the dishonour, agreeably to the practice of merchants in returned bills." According to these words, no summary diligence can proceed at the instance of a prior indorsee taking up the bill, unless it has been re-indorsed to him, or otherwise acquired as therein mentioned. These requisites enable him likewise to bring an ordinary action. But farther, this enactment is confined to a prior indorsee taking up the bill from a posterior one, and is not applicable to the payee, or the drawer when he is likewise payee. The reason of it, however, is applicable to all these cases; and, as the right seems to have been established by the decision already cited, as to the payee, or the drawer when he is payee, as well as with regard to an indorsee, it would probably be held, that it could not be taken away by the 12 Geo. III. c. 72, without express words, but that this

by pointing, he was entitled to exercise a right of retention. On this point reference was made to *Lees v. Dinwoodie*, 10th Dec. 1707, *Morr.* 3831, and *Glendinning's Creditors v. Montgomery*, 14th July 1745, *Morr.* 1449 and 2573. The answer was, that there was *bona fides* in these cases, but not in the present case. But *bona fides* is now held ineffectual to raise a right of retention on an irregular pointing; 2 Bell, 93.

act was merely intended to regulate the case of indorsees. The same right of summary diligence would also seem to belong to the payees of promissory-notes, since the 12 Geo. III. c. 72, allows the same diligence, in all respects, on such notes, which was previously competent on bills.

It is said to have been decided in one case¹, that a bill having passed through the hands of several indorsees, and being paid by a person *supra* protest, for the honour of the second indorser, without an indorsation of the bill or assignation of the protest to this indorser, the protest might notwithstanding be registered at the indorser's instance, with a view to diligence. This decision appears to be conformable with the 12 Geo. III. c. 72, now quoted, though that statute was not then passed.

It does not appear, that a mere assignation to a bill or note, which has been protested in name of the cedent, would authorise summary diligence in name of the assignee. But, if the assignation included the protest, it would probably give the assignee the cedent's right to follow it out by ulterior measures. At all events, the protest, when registered in name of any of the parties described by the statutes, is assignable to any person, to the effect of authorising diligence in the assignee's name; for it thus acquires, by the act 1681, the assignable quality of a decree of registration². A party may also reacquire a bill or note, or claims thereon, by retrocession³. It has been decided, that after horning on a bill had been denounced and registered, an assignation of it gave the assignee a right to have letters of caption issued in his name⁴. It is probable that marriage, being a legal assignation, would give the husband right to a protest previously recorded, or to diligence raised in the wife's name. An executor also gets right by confirmation to a protest registered, or diligence raised in his author's name. But a messenger cannot execute, in name of an assignee or executor, diligence issued in name of his author, because he has no judicial authority to take cogni-

¹ Crawford, 13th Jan. 1736; Elchies, Nos. 9 and 10, v. Bill.

² *Antea*, 292, note 2.

³ This is implied in *Banks v. M'Leish*, 12th Feb. 1830, 8 S. D. B. 515, though the circumstances of the case are very special.

⁴ *Young v. Buchanan*, 24th Jan. 1799, *Morr.* 8137. *Vide* also 2 Bell, 20.

sance of the assignation¹, or confirmation. It has been decided, that a party to a bill, who, on being obliged to pay it to the holder, got an assignation to a caption raised in the holder's name, could not sue the messenger for alleged misconduct in executing the diligence before the assignation, as the cedent, who was dead, had not complained of it during his life, the right to complain of such misconduct being held not to be transferred by the assignation².

Diligence has been sustained in name of the payee of a note against the granter, for behoof of a cautioner who had paid it³.

When the drawer of a bill payable to a third party is obliged to pay it on the drawee's refusal to accept, he can have no claim against the drawee on the bill, whatever may be his claim on previous transactions. But if the drawee has accepted, he will be liable in recourse to the drawer; because it has been shewn⁴, that acceptance affords a presumption of value in the drawee's hands belonging to the drawer, which cannot, in general, be redargued but by his writ or oath. This claim by the drawer against the acceptor is recognised in England⁵, and results from the nature of bills. It does not appear, from any of the acts already cited, to be the foundation of summary diligence, although a contrary notion has been sometimes followed in practice. Even the act 1681, c. 20, is limited to the payee or order, which cannot be considered as the situation of the drawer, unless he was also

¹ This principle was followed in *Hay v. Stewart*, 11th July 1745, Elchies, No. 6, v. Assignation, where an arrestment was found null which had been executed in name of an assignee on a horning issued in name of the cedent; in *Foggo and Galloway v. Scott and Oliver*, 7th Dec. 1769, F. C., where a poinding executed, under the like circumstances, in name of an assignee, was found null; and in *Kyle v. Thomson*, 12th June 1813, F. C., where the same decision was given regarding a poinding in name of the assignee, on a horning issued in name of the cedent.

² *Steel v. Grant*, 9th June 1814, F. C.

³ *M'Kechnie v. M'Farlane*, 13 Dec. 1831, 10 S. D. B. 126.

⁴ *Antea*, 87, *et seq.*

⁵ *Simmonds v. Parminter*, 1 Wils. 185, where such an action by the drawer against the acceptor of a bill, which the former had been obliged to pay in consequence of the latter's failure, was sustained, after full argument, first by the Court of King's Bench, and afterwards, upon writ of error, by the House of Lords.

payee. His claim of relief, therefore, should be pursued by action. As to the evidence of payment by the drawer, necessary to warrant an action, there does not seem to be any precise rule. A receipt to him on the bill would be the best evidence, but a separate receipt would also be sufficient. As he is not, in this case, payee of the bill, and consequently never had right to it, the scoring of indorsations could have no effect in his favour, since that only re-invests a party who had a right before the indorsations, as payee or prior indorsee. Nor would a receipt to the drawer on the bill give him any claim against the parties in whose names these indorsations stood, although they remained; because he is liable to payment before them. It has been decided in England, as already mentioned¹, that this claim of relief by the drawer against the acceptor cannot be transferred by indorsation.

It has not yet been decided, whether the drawer, on paying a bill upon which diligence has been raised, may not take an assignation to the diligence, to the effect of making good his claim of relief against the acceptor. But there does not appear to be any reason why he may not take and use it, like another assignee, for any purpose not inconsistent with the character which he bears *ex facie* of the bill, and consequently for his relief against the acceptor.

It has been decided in England, that, if the holder of a bill or note, after bringing an action upon it, pays it away to a third party with notice to him of the action, the action may be continued by the original pursuer, and the new holder will be prevented from raising another action. It was held that, in such a case, the new holder must be presumed to have consented to the continuance of the original action². In Scotland, the indorsement of the bill or note would be held to carry with it the right of action, and therefore the original pursuer would not be entitled, after the indorsement, to continue the action in his own name. Indeed, it would be a sufficient defence against him, that he was no longer in right to the document, or enabled to discharge it, or give it up. But the holder would not be entitled to bring a new action, while the other action was not exhausted: he must sist himself in the

¹ *Antea*, 268.

² *Marsh v. Newell*, 1 Taunt. 100.

first action, and with this view should obtain an assignation to it, which the pursuer is bound to give. When a bill or note is indorsed after summary diligence has been raised on it, there should be also an assignation of the diligence to the indorsee. It has indeed been held in England¹, that a party acquiring a bill, before the term of payment, of which acceptance has been refused, but which bears no marks of dishonour, may protest it again for non-payment. But this could not take place if there had been a previous protest for non-acceptance; because the new holder must be apprised of this by the noting on the bill, and could not, therefore, be *in bona fide* to take a second protest. Hence he is bound to procure diligence on the original protest, or, if diligence has been already raised, which he must ascertain, seeing that, in the case of a dishonoured bill or note, he is liable to all the objections pleadable against his author, he can obtain an assignation to it, or, on obtaining an assignation to the protest, may probably raise new diligence on it in his own name. When a party originally in right to a bill or note re-acquires it on payment, by virtue of a receipt or otherwise, these documents, which instruct his title, are registered with the protest, to afford warrant for diligence at his instance. But, if the protest is registered before he re-acquires the bill or note, it being a decree authorising diligence only by the party in whose name it is registered, the diligence cannot proceed in name of the new holder, unless he produces an assignation to the protest as a warrant for it.

If the holder of a bill or note agrees to discharge the acceptor or granter, either conditionally, as by acceding to a trust-deed under which he is to be discharged in a certain event, or absolutely, the discharge, whether private or judicial, under the authority of the bankrupt law, will not be good against an onerous and *bona fide* indorsee to the bill or note; but it will protect the party discharged against all claim by the drawer or indorsers, though they should pay the bill to the holder, as they are only cautioners for the acceptor or granter, and being, therefore, not liable after he the principal debtor is discharged, cannot have recourse against him if

¹ O'Keefe v. Dunn, *antea*, 287.

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they pay after being thus released. It has been held, however, in England¹, that, though the holder of a bill has proved under a commission of bankruptcy against the acceptor, yet if the acceptor has not got a certificate, and the drawer has in the meantime paid the bill, he may arrest the acceptor, without being bound by the former holder's act in proving. In Scotland, the mere lodging of a claim under a sequestration, which seems analogous to proving in England under a commission, does not seem to have such an effect, since every creditor is equally excluded, in such a case, from taking separate measures against the debtor's estate, and equally entitled, unless the debtor has got a personal protection or a *cessio*, to take measures against his person, whether his claim has been lodged under the sequestration or not. But it would seem that the drawer, or any indorser who may afterwards pay the bill or note, is bound by such an act, as well as the holder who lodged the claim ; since the holder is authorised by the bankrupt statute to exert the powers which it gives so as to affect the whole claim, in whatever party it may be afterwards vested. This doctrine seems applicable, not only to his consenting to a discharge on payment of a composition or otherwise, but to every intermediate act authorised by the statute, by which the claim may be affected.

¹ Mead v. Braham, 4 M. and S. 91.

SECTION II.

Procedure by Action or Diligence on Bills or Notes.

1st, As to the procedure by action on bills or notes, there is no essential difference, in the form of the summons or otherwise, between the procedure on it, and on any other document of debt. The English courts, in which the forms of action have long been much stricter than in our courts, have, in many instances, decided, that a variance between the document described in the declaration and that to which the proof applies is fatal to the action. Whether the forms of pleading in Scotland is now so strict as to render any of the English decisions on this subject applicable, I will not determine. Our practice must be better matured, and its principles more fully developed, before it be ascertained how far such decisions, or any of them, can be safely engrafted on it.

The 6 Geo. IV. c. 120, establishing a new form of process in Scotland, and requiring, *inter alia*, that, in every action, “the nature, extent, and grounds of the complaint or “cause of action shall be set forth in explicit terms,” in the summons, and the rules enacted, both by that statute, and by the consequent Acts of Sederunt, as to the framing of records, have introduced greater precision into the form of actions with regard to bills or notes, as well as other claims. In four different cases¹, actions on bills have been lately dismissed, because the grounds of claim ultimately maintained were not those set forth in the summons, and because those set forth in the summons were untenable¹. But summary diligence is

¹ This was done in *Dickie v. Gutzmer*, 27th Feb. 1828, 6 S. and D. 637, where a summons libelling on a re-indorsation by the indorsee to the drawers of a bill, who were prior indorsers, was found irrelevant; and the Court would not admit a different ground of action in the pursuer's condescendence, in *Ewing's Trustees*, 25th Feb. 1829, 7 S. and D. 464, where a summons having set forth, that the bill libelled was indorsed to the pursuers by the defender, and the pursuer's condescendence stating, that it had been indorsed by the defender to a bank, and afterwards retired by the pursuer, the summons was dismissed, as not

much oftener resorted to in Scotland on bills or notes, than an ordinary action.

2d, Summary diligence.

1st, The statute 1681, c. 20, which is the leading enactment, requires, in order to summary diligence for non-acceptance or non-payment, that the bill or note shall have been duly protested before expiration of the three days of grace. This provision must apply, in case of acceptance and non-payment, only to acceptors, because none but acceptors were made liable by the act, in that case, to summary diligence. The same thing is required as an ingredient of a regular protest in inland bills and promissory-notes, by 12 Geo. III, c. 72, which also assumes that the same rule is enforced with regard to foreign bills; and, indeed, the act 1681, c. 20, which relates to foreign bills, allows summary diligence only in the case of bills "*duly protested* for not-acceptance or for not-payment." Accordingly¹, where a bill had not been so protested, the Court refused summary execution against the drawer or indorsers, although there was reason to believe, that the parties had agreed to dispense with strict negotiation, this being held to afford ground only for an ordinary action. If diligence, however, raised on such a protest were suspended, there does not seem to be any reason why the charge should not be turned into a libel. In case of non-acceptance, the protest ought to be taken for non-acceptance against the drawer and indorsers, and the instrument of protest should bear this, to warrant diligence against them. A decision to the contrary, which has been already mentioned, appears to be questionable². It is said to have been decided in another case³, that a protest for non-payment against the drawer *and all others concerned*, without naming the acceptor, afforded a

being supported by the condescence; and in two cases, Jackson, 9th Dec. 1825, 4 S. and D. 292, and Muir v. Braidwood, 30th Nov. 1831, 10 S. B. D. 83, where the summons having libelled on a bill as drawn by a certain party, and it being admitted that the bill was not drawn by him, it was found not competent, under such a summons, to prove that the alleged drawer's name had been subscribed by another party, for his procuration, or with his implied assent.

¹ Elliot v. Richmond and Pollock, 5th Aug. 1775, Morr. 1602.

² Yuill v. Richardson, 25th July 1699.

³ Inglis and Fowles v. Mackay, 1697, Forbes, 139.

warrant for horning against him. But in such a case, the instrument of protest ought, at least, to *imply* that a protest was taken against the acceptor.

2dly, The instrument of protest must be recorded. From what has been already said ¹, it appears that it is not necessary to extend an instrument of protest immediately, whether for non-acceptance or non-payment, in order to preserve recourse against the drawer and indorsers of a bill or note, but that it is sufficient if the extended instrument be produced when an action is raised. To obtain summary execution, however, the instrument of protest must be extended and registered, in the books of the Court of Session, or of any court competent to try an action for payment of the bill or note. In a late case ², it was decided, that a protest recorded against the drawer, not in the books of the jurisdiction in which he resided, but in those of the jurisdiction where the bill was payable, could not form the ground of summary diligence against him, and that the charge given could not be turned into a libel after the record was closed. It was implied in the opinion expressed by some of the Court in another case ³, that a precept issued by a Sheriff-court, and bearing to proceed on a registered protest, was not a valid ground for charging the debtor, unless there was other evidence that the protest had been registered. The registration, as a ground of diligence for non-acceptance, must take place within six months after the date of the bill or note, or for non-payment, within the same time after it falls due. This last period must run from the last day of grace, in all bills or notes on which days of grace are allowed, since it is only then that they fall due. A copy of the bill or note must be prefixed to the instrument.

It has been decided ⁴, that after a protest on a bill was taken in name of the bank that discounted it, the instrument of protest might be extended and registered in name of a different party, who had in the meantime onerously acquired the bill. But the soundness of this decision may be questioned ;

¹ *Antea*, 447.

² *Campbell v. M'Donell*, 22d Feb. 1827, 5 S. and D. 412.

³ *Watts v. Barbour*, 1st July 1828, 6 S. and D. 1048.

⁴ *Mackie and M'Omish v. Hilliard and Co.*, 15th June 1822, 1 Shaw, 499.

for if the protest was taken at the instance of one party, it does not appear correct to represent it in the instrument, as in this case, to have been taken at the instance of another party. The party acquiring the bill after the protest might, as has been already shewn¹, have obtained diligence in his own name, though the protest was extended in name of another; and if it was so registered, he might still have got right to it by assignation. The question now stated was since raised in another case². But the Court held that it came too late, as there had been previously a deposition on a reference as to the onerosity of the bill.

The registration of the instrument of protest has the effect of a decree by a competent court for payment of the bill or note. Bonds generally contain a clause stipulating that they shall be registered for execution in the books of some competent court; and being registered by virtue of this clause, an extract of them is held equivalent to a decree, and, without farther procedure, affords ground for immediately issuing letters of horning, of which the effect shall be afterwards explained. The acts already quoted with regard to bills and notes, provide, that the recording of an instrument of protest on them shall afford ground for interponing the authority of the judge thereto, to the effect that diligence may proceed thereupon, "in the same manner as upon registrat bonds, or decrees of registration proceeding upon consent of parties."

It has been held, as to an extract protest bearing date 20th December, that an erasure in the figures 20 is no ground of nullity, the protest being a warrant for summary diligence, if recorded on any day of the month of December³.

It would appear that the simple possession of a bill or note is sufficient, without an express mandate from the creditor, to authorise the taking and recording of a protest, or the issuing of letters of horning on it. This seems to be the law, when the creditor is out of Scotland, though in that case an action could not be brought without a mandate. But the rule is different as to diligence. 1st, Both taking a pro-

¹ *Antea*, 565-6.

² *Allan v. Galli*, 5th June 1829, 7 S. and D. 706, F. C.

³ *Crichton v. Watt*, 25th Nov. 1830, 9 S. D. B. 68.

test and recording the instrument of protest are purely ministerial acts, which require no judicial permission to authorise them, and the performance of which cannot be prevented by the debtor on any ground. *2dly*, When the protest has been recorded, the extract of it, which cannot be refused by the proper officer, is equivalent to a decree. The granting of letters of horning, as soon as this extract or decree is presented, is also a ministerial act, which must be performed without discussion, on ascertaining that there is a decree, to which the person for whom diligence is craved has a title. There are no *termini habiles*, therefore, for inquiring, whether there is a mandate or not. A mandate is required from the pursuer of an action, that there may be a person in this country responsible for expenses of process. But here there is no process. Accordingly, in two cases, where diligence on a bill at the instance of a party residing abroad was objected to, on the ground that no mandatary's name had been inserted in the horning, the objection was repelled¹.

In a case², where the trustee in a sequestration had first given the agent in the sequestration one bill to do diligence on it, and, afterwards, on taking another bill for the same debt at a longer term, sent him it, though without express instructions to do diligence on it, the agent was, notwithstanding, held, under the circumstances, to have an implied authority to do diligence on it when it fell due, and, therefore, as the trustee had neglected to inform the agent of some partial payments, in consequence of which a charge given by him for the full sum was suspended, with expenses, he was found entitled to reimbursement of those expenses from the trustee. But an agent is not authorised, by mere possession, to raise action or diligence on a bill marked "Paid," because it is presumed, from such marking, to have been retired by the proper debtor³.

¹ *M'Kie and M'Omish v. Hilliard and Company*, 14th Nov. 1820, and 11th June 1822, Second Division, not reported; *Stiven and Greig v. Bird*, 27th June 1822, First Division, N. R. In this last case the charger's agent sisted himself as his mandatary in lodging answers to the bill of suspension; but this did not afford an answer to the objection that no mandatary's name was inserted in the horning.

² *M'Donald v. Kelly*, 5 July 1821, 1 S. B. 101, Session papers.

³ *Jackson v. Williamson*, 9 Dec. 1825, F. C., and 4 S. and D. 202.

The extract of the instrument of protest, being equivalent to the decree of a competent court for payment of the bill or note, affords warrant for letters of horning, which are precepts issued in name of the Sovereign, commanding that the debtor be charged to make payment of the debt. A form of these letters, with variations applicable to bills and notes of different kinds, is given in the Appendix. The charge on letters of horning is executed, in ordinary cases, on *induciae* of fifteen days; but in bills or notes, six days only are allowed¹. Such a charge is a preliminary step towards execution for payment of the debt, or, in the words of the act, that “*executorials necessary may pass thereupon.*” If the debtor does not pay when the days of charge expire, he may be apprehended and imprisoned under letters of caption, and his moveables may likewise be attached or poulded for payment of the debt under a warrant to that effect, which is always inserted in the letters of horning. The effects being thus attached, may be afterwards sold for payment of the debt under a warrant of sale. There is likewise a warrant in the letters of horning, by which the creditor may arrest all debts due by third parties to his debtor, as soon as the horning is issued from the signet². A registered protest for non-payment was found, before the 12 Geo. III. c. 72, not to be a sufficient warrant for arresting the drawer's effects without a depending action³. But the 12 Geo. III. c. 72, makes summary diligence of all kinds competent on non-payment, as well as non-acceptance, against the drawers and indorsers of bills and notes as well as the acceptors of bills.

It has been held illegal in the indorsee of a bill to give a charge on it as messenger, against the acceptor, for his own behoof, and that of other indorsers⁴.

The debts arrested may be afterwards transferred to the creditor, in payment of his debt, by a process of forthcoming. The creditor may also bring a process of adjudication, as soon as the debt becomes due, to attach the debtor's heritable pro-

¹ 1681, c. 20.

² This point was unanimously decided by the Court, with regard to an arrestment upon a horning raised on a promissory-note, in *Weir v. Falconer*, 2 Feb. 1814, F. C.

³ *Richardson v. Fenwick*, 3 March 1772, Morr. 678, Hailes, 471.

⁴ *Dalglish v. Scott, &c.* 18 June 1822, 1 S. B. 506.

perty. The debtor may be prevented from disposing of his heritable property to the creditor's prejudice by letters of inhibition, which may be issued either on the bill or on the registered protest, in security, even before the term of payment, if he is *vergens ad inopiam*.

It has been decided on a hearing before the whole Court¹, that the payee of a bill, who had indorsed it away, might, before the term of payment, competently arrest the acceptor as *in meditatione fugæ*, till he found security to pay the bill, or to abide the raising of diligence against him for payment of it.

These are the principal kinds of execution against the debtor's person and property, for which the registration of the protest affords a warrant. The details of procedure applicable to each need not be here given, since a full account of them, considered as the means for enforcing payment of every kind of debt, is contained in all elementary treatises.

3d, Diligence on bank-notes and bankers' notes.

Summary diligence on bank-notes and bankers' notes would probably have been competent under the general enactments of the 12 Geo. III. c. 72, had it not been specially regulated, before that act was passed, by the 5 Geo. III. c. 49, § 4, 5, 6. That statute enacts, 1st, That, in the case of all "notes, accepted bills, post-bills, tickets, tokens, or other writings for money of the nature of a bankers' note, circulated or to be circulated as *specie*," summary diligence, by recording the protest, and other steps already detailed with regard to bills, shall proceed at the holder's instance against the individuals or bodies politic or corporate "liable in payment of the same," or their representatives, "not only for the sum or sums therein contained, but also for the interest thereof from the time of demanding payment;" 2dly, That a protest, taken "at the office of the person or persons, bodies politic or corporate, liable in payment of the same, between the hours of nine in the morning and three in the afternoon, for not payment, or for not marking" of such documents, shall be registrable with a view to summary diligence, at the time and in the manner already explained in the case of bills; 3dly, That, instead of taking a separate protest on each note

¹ Thom v. Black, 10th Dec. 1828, 7 S. and D. 158.

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or other such document, when diligence is required on several notes of the same tenor, it shall be sufficient to prefix to the protest the contents of one of them, and "subjoin thereto the "dates and numbers of all other notes and writings aforesaid, "of the same tenor and contents, whereof he or she shall then "demand payment:" And, *4thly*, That no suspension or sist of a charge or other execution on such documents shall pass, but on a discharge from the holder, or on an offer, "made to him or her, in the form of an instrument duly signed by a notary-public and two witnesses," to pay the full amount of the note or other such document, with the expenses of protest, registration, and other diligence, to be certified by an account under the holder's hand; reserving, however, to the debtor his action of repetition for any overcharge in such account, and to the holder his claim of damages for undue delay of payment. This enactment is still in force. But it does not seem to warrant diligence against an indorser of such notes, which, therefore, if it occur, must be regulated by the 12 Geo. III. c. 72.

SECTION III.

*Claims against the several Parties to Bills or Notes, recoverable by Action or Diligence.*1. *Claims against the several parties.*

At common law, the person in right to a bill or note has a claim first against the granter or acceptor, (but not against the drawee not accepting, though there may be a separate claim, if he was bound to accept); and, failing payment by these parties, then against all or any one of the previous parties for the full amount of the bill or note. The primary claim for payment against the acceptor applies as much to an acceptor for honour as to the drawee, since the former has, as to the holder of the bill, placed himself in the situation of primary debtor. It has been settled, both as to foreign and inland bills, that there is a direct claim against every indorser, without previously claiming against the drawer or prior indorsers, each indorser being considered as a new drawer¹. This claim, as already explained², is equally competent to the creditor in the bill or note, or to any party who has been obliged to pay it, against the parties prior to him. But neither the drawee of a bill nor maker of a note can sue any of the other parties on it, since he is the proper debtor. Accordingly, it has been held³, that the bail of the maker of a note, after paying it, could have no recourse against an indorser. A person who has accepted a bill or granted a note for the accommodation of another, may have an action of indemnity against the latter, but not on the bill or note⁴. It has been already shewn⁵, that no person can be liable on a bill or note, unless his name, or that of some party who re-

¹ *Antea*, 501.² *Antea*, 564, *et seq.*³ *Hull v. Pitfield*, 1 Wilson, 46. In this case, the indorsee of the note, after getting payment of it from the maker's bail, had allowed the latter to sue the indorser in his name. But the Court of Common Pleas held such a claim to be incompetent, the bill being extinguished.⁴ *Young v. Hockley*, 3 Wils. 346.⁵ *Antea*, 218.

presents him, be on it. If a person delivers a bill or note, without indorsing it, in payment of a preceding debt, he will be liable, in case of its non-payment, not on the document itself, but for the preceding debt ¹.

When the holder of a bill or note makes the acceptor or granter his executor, it has been said, that, unless the latter renounces, the debt will be extinguished, not only as to him, but as to all the other parties, since their obligation is merely subsidiary to his ².

When several parties are bound together for a bill or note, whether in the same character, for instance as joint drawers, acceptors, or indorsers, or in different characters, viz. one as drawer and another as acceptor, the person in right to the bill or note is entitled, on non-payment, to sue them all at the same time, and take execution against them all, till he recovers full payment. In a case prior to 12 Geo. III. c. 72 ³, warrant was granted for summary diligence at the instance of the holder of a bill against the drawer and whole indorsers, without previously discussing the drawer, the Court holding that they were all to be considered as drawers. This must have been an unaccepted bill. But by 12 Geo. III. c. 72, summary diligence is also authorised against all the parties to a bill at the same time, in case the bill is accepted but not paid. Payment by one of them will extinguish a bill or note as to all the rest ⁴, so far as the holder is concerned. The party paying may insist for an assignation to the debt and diligence, that he may operate his relief against the other parties. For instance, one of two joint acceptors, on being sued for payment, may insist on previously getting an assignation to any decree or diligence obtained against his co-acceptor, that he may thereby more effectually operate his relief ⁵. When the holder, after getting

¹ *Antea*, 162, *et seq.* and 278.

² Pothier, Nos. 190-1. This was also decided in *Freakley v. Fox*, 2 B. and Cr. 130, 4 M. and Ryl. 18.

³ *A. v. B.*, 26th Feb. 1747, Morr. 1510.

⁴ In *Windham v. Withers*, and *Ditto v. Trull*, 1 Str. 515, the holder of a promissory-note having obtained judgment in actions both against the drawer and the indorser, and a tender having been made to him of the principal sum in one of the actions, and the costs in both, an order was given to stay execution.

⁵ *Erskine v. Manderson*, 14th Jan. 1780, Morr. 1386.

payment from one of two acceptors, allows diligence which has been begun still to go on in his name for behoof of that acceptor against the other acceptor, (this being avowed, so as to admit any pleas of compensation against him,) such a proceeding is held competent¹. It has been decided², that the holder is bound to accept an offer of payment with expenses made by a third party, and to give him thereupon an assignation to the debt and diligence, but without recourse on him; and his refusal was held to be a good ground for suspending a charge given by him to one of the acceptors. In another case, it is said to have been decided by the First Division of the Court, on a verbal report by the Lord Ordinary on the Bills, that the holder of a bill payable to the drawer, and indorsed by the latter to him, was bound, on getting payment from the acceptor, to give him an assignation, without recourse, of his own claim against the drawer³. But, in a later case⁴, it was held, that an indorsee, who had paid, as was said, for the drawer's behoof, and afterwards got payment from a party who was liable, under a bond of presentation for the acceptor, on a letter by his agent, engaging to grant an assignation to the debt and diligence, was not liable to grant such an assignation as against the drawer. In a recent case⁵, where a party had indorsed a bill, (as was said,) for the drawer's accommodation, which was discounted with a bank, and dishonoured, and a third party, brother-in-law of the drawer, whose name was not on the first bill, put his name on a second bill for the same sum, as an indorser, prior to the indorser of the first bill, and the proceeds of it were applied in extinction of the first bill, he was found entitled, on retirement of the second bill, under an assignation from the bank to the debt and diligence on the first bill, to enforce it, for his relief, against the indorser, though the latter was posterior to him on the second bill. But, as he seems, by indorsing the second bill *before*

¹ Walker and Johnstone v. Sir W. Forbes and Co. 29th May 1829, F. C., and 7 S. and D. 684.

² Rainie v. Milne, 1 Shaw, 377, F. C.

³ Lee v. Wallace, 1822, N. B.

⁴ Cameron v. Robertson, 2d Feb. 1830, 8 S. D. B. 430.

⁵ Chalmers v. Taylor, 20th Nov. 1832, 11 S. D. B. 53. *Vide* the opinion of Lord Gillies, which is against the judgment.

this indorser, to have admitted that he had no claim of relief on it against him, it may be doubted whether he could be entitled thus to operate his relief on it indirectly, by an assignation to the diligence on the first bill, which could not make his substantial right better, though it might afford him the legal means of enforcing it.

The creditor, after getting a partial payment from one of the parties, can insist against the others only for the balance. It seems, indeed, to have been decided in England, that, after the holder had got a partial payment from the indorser, he might insist for the full amount against the drawer and acceptor¹. There might be some reason for this judgment, if the indorser made such a payment without marking it on the bill or note; since, by allowing the document to remain unmarked in the indorsee's hands, and thus enabling him to discharge it, he empowers him to receive full payment, reserving his own claim against him for the sum previously paid. In such a case it is *jus tertii* to the drawer or acceptor, whether the whole amount is claimed from them by the holder, or the sum already paid is claimed separately by the indorser for his relief. But if the indorser's payment is marked on the bill or note, the holder is not entitled to discharge, or consequently to exact payment of more than the balance. It has been said, that the contrary rule is necessary to prevent the hardship of separate actions on the same bill or note at the instance of different parties. But the proper action or diligence *on the bill or note* would still be only one, viz. by the holder for the balance due to him. The claim by the indorser against the previous parties for the sum which he paid, is not properly a claim on the bill or note, but a distinct claim of relief, to which none of these parties can object, since they have rendered themselves liable to it by not making payment. That this was the proper nature of such a claim, was lately decided, in an action by the drawer of a bill against the acceptor, for repayment of part of

¹ This seems to be the import of the decision in *Johnson v. Kennion*, 2. Wils. 262, as recognised and confirmed by Eyre, C. J., in *Walwyn v. St Quintin*, 1 Bos. and Pull. 658, and also of a recent decision in *Reid v. Furnival*, 1 Cr. and Meas. 539, and 5 C. and Pay. 499. *Vide* the opinion of the Court in *Bacon v. Séaries*, *post*. 582, note 2.

it paid by him to the holder, where, the action being brought, not on the bill, but as an action for money paid to the acceptor's use, was held to be properly laid¹. Accordingly, the correctness of the decision, first referred to on this subject, and even the accuracy of the report, have been since much questioned². In Scotland, it has been decided³, that the trustee on an indorser's estate was entitled to sue the acceptors for repetition of certain dividends recovered by the holder out of the indorser's estate, as well as for relief from all future payments, without producing the bill, which the holder had retained, to make good his claim for the balance against the other parties. The ground of decision was the principle now stated, viz. that the action was not brought on the bill, but was an action of repetition and relief founded on the relative situation of the different parties to the bill, in which the bill would have formed merely an article of evidence, if it had not been rendered unnecessary by admission of the facts on which the pursuer's claim was founded.

It has been decided, that the payment of part of a bill by the drawer precludes the holder from suing the acceptor for more than the balance⁴. A partial payment by the acceptor undoubtedly precludes the holder from suing either the drawer or indorsers for more than the balance, because these parties are not bound to pay, unless in so far as the acceptor has failed to pay.

The holder of a bill, although he has received full payment from one party, may continue any separate action which he has previously raised against the other obligants, to the effect of recovering expenses, provided such action was necessary. But, in general, when an ordinary action is brought in Scotland on a bill or note, all the obligants may, and

¹ *Pownall v. Ferrand*, 6 B. and Cr. 439.

² *Per Wilson, J.*, in *Bacon v. Searles*, 1 H. Bl. 90.

³ *Thomson and Co.'s Trustee v. Craig and Hunter*, 10th Dec. 1818, and 26th Jan. 1819, *Scots Papers*.

⁴ *Thomson and Co.'s Trustee v. Craig and Hunter*; *vide also Pierson v. Dunlop*, 2 Campb. 575, where the holder of a bill having taken a verdict for its full amount against the acceptor, without deducting a previous payment made by the drawer, was obliged afterwards to deduct it.

therefore, to save expense, ought to be included in one summons. As each obligant is severally as well as jointly bound, there does not seem to be any objection, in form, to a separate action against one of them, although the rest should not be called. In one case ¹, where a debt against a company had been constituted by a bill, signed by the company firm, it was found competent, after the dissolution of the company, to sue the representative of one of the partners on the bill, without calling any of the other partners. In another case, already noticed ², a charge given to a certain house, who had refused to accept a bill, as partners of a subsisting company which had drawn it, was sustained, though no charge had been given to the other partners. The recent practice, in actions brought on company obligations, against one partner, even of a dissolved company, has been to sist process till the other partners are called ³. But, in an action on a bill or note against one obligant, I am not aware that process has ever been sisted till the other obligants are called.

In an English ⁴ case, where the holder of a bill, after the term of payment, got a new bill from the debtor for its amount, with a warrant to confess judgment on it, and it was paid, but not the expenses of enforcing the warrant, it was held by the Court of Common Pleas, that he could not afterwards sue on the first bill, to recover these expenses, in respect he was not entitled to hold it as a security for expenses.

It has been decided ⁵, that the holder of a bill barred himself from suing the acceptor, by agreeing to stay proceedings against him, in consideration of his undertaking to assign part of his income to a trustee for his creditors, although no such trustee had been appointed, this remaining with the creditors, and the acceptor having been always willing to do his part. It has been also decided, that the holder of a bill could not sue the acceptor for its amount, which he had paid over to

¹ *M'Tavish v. Lady Saltoun*, 2d Feb. 1821, F. C.

² *Thomson v. Liddel and Co.*, 2d July 1812, F. C.

³ *Johnstone v. Duncan*, 20th Jan. 1824, 2 S. and D. 625; *Geddes v. Hopkirk*, 2d June 1827, 5 S. and D. 747.

⁴ *Dillon v. Rymer*, 7 Moore, 427.

⁵ *Good v. Cheeseman*, 2 B. and Ad. 328.

other parties, against whose claims for it the holder had granted him a letter of indemnity, because, though the acceptor paid it to him, he would, in respect of his having been obliged to pay it to the other parties, have been entitled to recover it back immediately under the indemnity¹.

If a bill or note has been subscribed with the firm of a subsisting company, payment must be first demanded from the company, and it is only on their non-payment that recourse can be had against the individual partners. The creditor has taken the company as primary obligant, and he cannot, till they have failed, resort to action or diligence against the individual partners, who are bound merely as guaranties². On this ground there may be reason to doubt a decision already referred to³, so far as it found that the partners of a house in this country, being partners of a house in America, which had drawn a bill on them, were, notwithstanding their refusal to accept, liable individually to immediate diligence as drawers; for, although the bill was drawn payable in London, yet that obligation of payment seemed to attach only to the drawees, in case they accepted, and did not dispense with the holder's obligation to return the bill, in case of non-acceptance, on the drawers, viz. the company, at their place of business, where it was drawn. It appears to be only after such return, and a refusal to pay, that recourse can be had to the individual partners. But, if the company is dissolved before the bill becomes due, each partner is then directly liable *in solidum*, since there is no longer a company to which the primary obligation can attach.

Drafts on bankers, which, as already mentioned⁴, can only be made effectual by ordinary action, may be the ground of action either against the drawer or any of the indorsers, if payment should be refused by the bank on which they are drawn, or against the bank, so far as it can be proved that it has funds belonging to the drawer, seeing the draft is an assignment of these funds to its amount.

Such are the proceedings authorised against the different

¹ Carr v. Stephens, 4 M. and Ryl. 590.

² 2 Bell, 619.

³ Thomson v. Liddel and Co., 2d July 1812, F. C.

⁴ Antea, 557.

parties to bills and notes at common law. The summary execution, already mentioned, was enacted, by the acts 1681 and 1696, with regard to foreign and inland bills, against the drawer and indorsers in case the bills were not accepted, but, in case of their acceptance, against the acceptors only, the drawer and indorsers being liable, in that case, merely to an ordinary action. But the act, 12 Geo. III. c. 72, as already quoted¹, enacted, both as to such bills and as to promissory-notes, that summary execution should proceed at the holder's instance against all the parties to such bills or notes conjunctly or severally. The effect of payment, whether total or partial, by one party, in extinguishing all claim on the bill or note with reference to other parties, has been already considered as to the case of an ordinary action², and the same doctrine is applicable to diligence. Such payment will not prevent the holder of the bill or note from following out his claim for the expenses of diligence against the other parties; but these must be recovered by an ordinary action.

2. *Sums recoverable on Bills and Notes.*

1. Principal sum.

As to the principal sum in bills or notes, recoverable under them, it is needless to add any thing to what has been already said³. In the case of a bill or note payable by instalments, but which declares that, if there should be a failure to pay one instalment, the whole shall become due, this condition must receive effect, since it is consistent with the nature of bills and notes to have thus a term of payment of which the arrival is certain, though the time of its arrival may vary with circumstances. In England, it has even been doubted whether the holder of a bill or note payable by instalments is not entitled to take a verdict for the whole of them at once, though not more than one has become due⁴. This question seems to have arisen from considerations peculiar to English law⁵. In Scotland, where the introduction of summary diligence has rendered it necessary to abide strictly

¹ *Antea*, 551.

² *Antea*, 581, *et seq.*

³ *Antea*, 581, *et seq.*

⁴ *Vide cases detailed by Lord Loughborough, C. J., in Rudder v. Price, 1 H. Bl. 550.*

⁵ *Ibid.*

by the terms of the contract, neither diligence nor action can be raised on such a bill or note, except for the several instalments as they respectively become due. The bill or note seems to have the same effect with reference to the different instalments, as if there were separate documents for each instalment. There is only one apparent exception to this doctrine, viz. where the debtor is sequestrated, in which case the holder of a bill payable by instalments would be entitled, under the 54 Geo. III. c. 137, § 47, to rank immediately for the amount of each instalment, under an abatement of interest corresponding to the time that must elapse before it falls due. In this case, a question has been raised, whether the holder, after thus drawing a dividend on the different instalments, which exceeds the total amount of the first instalment, is bound only to impute to it the dividend set apart to it, and may therefore use ultimate diligence for the balance of it still unpaid; or whether, in a question of diligence, he is not bound, notwithstanding the statute, to hold the receipt of the different dividends, so long as the first instalment only has fallen due, to be one payment in extinction of that instalment, so as to preclude him from using diligence for the balance. This question shall be considered in the chapter on Bankruptcy.

2. Interest.

The legal claims for interest on bills and notes are regulated in Scotland by statute. The first enactment on the subject is contained in the act 1681, c. 20, which enacts, "That the sums contained in *all* bills of exchange bear "annualrent, in case of not acceptance, from the date there- "of, and in case of acceptance and not payment, from the "day of their falling due, ay and while the payment there- "of." Although this clause mentions *all* bills of exchange, it ought probably to be limited to foreign bills, since these form the subject of the statute. But, as the act 1696, c. 36, not only allows the same summary execution on inland bills as on foreign bills, but declares that the act 1681 is "extended "to inland bills and precepts in all points," the clause in it which relates to interest is thus extended to inland bills. Some doubt was expressed on this subject by Mr Forbes ';

but the Court afterwards held¹, that the act 1696 did extend the clause in question, as well as the rest of the act 1681, to inland bills, and therefore they found the acceptor of an inland bill liable for interest on it from the term of payment. This rule regarding interest was extended to promissory-notes by the 12 Geo. III. c. 72, which enacts that such notes “shall bear interest as bills.”

Agreeably to the act 1681, which is the fundamental act regarding interest, it is due, on bills not accepted, from their date, and, on accepted bills and notes, from the term of payment. It has been said², that a protest is necessary to afford ground for a demand of interest. This may be true with the non-acceptance of bills; because, in that case, the claim lies only against the drawer and indorsers, against whom no recourse can be preserved for any claim arising from the bill, without a protest. This rule must also apply as to any claim against these parties for interest on bills accepted, but not paid. But there is no ground for applying it, in the case of such bills, to claims of interest against the acceptor. The principal sum may be claimed from him, though not by summary diligence, without a protest; and a protest seems equally unnecessary to enforce a claim for interest. The contrary, indeed, appears to have been once held³ as to a foreign bill. But, in a later case, relating also to a foreign bill, it was decided⁴, that the acceptor was liable for interest though there had been no protest. The distinction which has been now stated betwixt the drawer and acceptor, as to the necessity of a protest, was pleaded in this case, and seems to have been adopted by the Court. The same rule applies to a claim of interest against the acceptor of an inland bill, or the granter of a promissory-note. Accordingly, in the case⁵ of an inland bill which had been accepted, and had lain over for many years without protest, interest was allowed against the acceptor.

Interest, being due by statute on accepted bills and on

¹ Blair v. Oliphant, 8th June 1708, Morr. 473.

² Glen, 276, 2d edit.

³ Watson v. Gordon, 15th July 1713, Morr. 475.

⁴ Baynton and Schaw v. Swinton, 14th Nov. 1718, Morr. 474.

⁵ Tarras v. Innes, 22d Jan. 1740, Morr. 476.

notes from the term of payment, may, when they are payable at a fixed term, be exacted from the acceptor or granter without a previous demand of payment ; for the claim of interest here arises at the term of payment. It has been shewn ¹, indeed, that at common law the acceptor or granter is bound to make payment, at least to the original creditor, without a formal demand. In bills or notes payable a certain time after sight, presentment must be proved to fix the term of payment, from which, in case of acceptance, the interest is to run. The same thing is necessary with bills or notes payable *at sight*. If days of grace are, according to what has been already stated ², allowed on such documents, interest will begin to run on them from the last day of grace. In accepted bills or notes payable on demand, it will run only from the demand, since that is the term of payment. When there is a protest for non-payment, the date of the protest will be held to be the date of the demand. In an action ³ on a bill payable on demand, the Court found interest due only from the date of citation. But it does not appear that there was an extrajudicial demand. In the same case, interest was found due on a promissory-note from the date of citation, *ex bono et æquo*, (as the report bears,) although interest was not then due on such notes by statute.

It has been shewn ⁴, that, when the acceptance of a bill is dated, that will be held to be the date of presentment ; and consequently that, in a bill payable at or after sight, the term of payment, from which interest must run, will depend on the date of acceptance. If the acceptance is not dated, presentment will be held to be of the date of the bill ⁵. In two cases of accepted bills, where the drawer, who was also payee, and the acceptor lived in the same place, one of the bills being made payable three days after sight, and the other at sight, the Court, chiefly in respect that the drawer and acceptor lived in the same place, held that the acceptance, which was not dated, must be presumed to be of the date of the bill, and therefore found interest due, in the one case, from its date, and, in the other, from the third day after date, as being re-

¹ *Antea*, 384, *et seq.*

² *Antea*, 377-8.

³ *Moncrieff v. Moncrieff*, 7th Feb. 1752, *Morr.* 479; *Elchies*, No. 52, *v. Bill*.

⁴ *Antea*, 66-7.

⁵ *Ibid.*

spectively the terms of payment¹. The same presumption seems applicable, under the modifications already explained, although the drawer and drawee should reside in different places².

In an action against a husband, on his wife's acceptance of a bill, drawn for a sum which consisted partly of the amount of necessary furnishings, and partly of interest from its date, the Court found that no interest was due; the argument of the successful party being, that, though a wife might contract for necessaries, she could not grant securities bearing interest³. This decision seems to apply as much against the interest accruing on a bill or note *ex lege*, as against that which formed part of the bill. But, though interest is due *ex lege* on all bills and notes, actions against a husband on bills or notes granted by his wife for necessaries, are not properly actions on these documents, in which case interest would be due *ex lege*, but for the debts contracted, in which the bills or notes are received as evidence.

The validity of bills or notes stipulating interest from a date prior to the term of payment has been already considered⁴. It has been held in England, that a bill or note purporting to be for money lent bears interest from its date⁵. It has been also held⁶, that a note containing the words "bearing interest," carries interest from its date, not merely from the term of payment, since it would carry interest from that term at all events. Such a stipulation, however construed, would also make the interest recoverable by summary diligence⁷.

¹ *Tarras v. Innes*, 22d Jan. 1740, *Morr.* 476; *Elchies*, No. 21, v. Bill; *Kinloch of Gourdie v. Mercers*, 22d Nov. 1748, *Morr.* 478; *Elchies*, No. 40, v. Bill.

² *Antea*, 68.

³ *Forrest v. The Earl of Sutherland*, 24th Nov. 1749, *Morr.* 478.

⁴ *Antea*, 14, *et seq.*

⁵ *Cotton v. Horsmanden*, *Prac. Reg.* 357, cited in *Bayley*, 349, note 39.

⁶ *Per Lord Ellenborough* in *Kennerley v. Nash*, 1 *Starkie*, 452; also in *Doman v. Dibden*, 1 *R. and M.* 382.

⁷ In a former edition, I expressed doubts, whether interest, when not expressly stipulated in bills or notes, can be recovered by summary diligence. But, on reconsidering the act 1681, c. 36, with regard to bills, and the 12 G. III. c. 72, which extends it to promissory-notes, I think that they admit the extension of summary diligence to the interest as well as principal sums.

When an accepted bill or note is payable by instalments, interest is only recoverable on each instalment from the time it falls due; because that is the term of payment applicable to it, unless there is a stipulation that the whole instalments shall become due at once, on failure to pay any one of them; in which case interest will be recoverable on the whole from the time when the first instalment became due, as being, according to the bill or note, the term of payment in that case for the whole instalments.

Interest on bills and notes being exigible in Scotland by statute, and not, as in England, merely as damage for breach of contract, there is no room for an abatement of the claim, as in England, on equitable grounds. It has been held in England¹, that a jury "may even allow nothing in name of interest, in case they are of opinion that the delay of payment has been owing to the fault of the holder." But it does not appear that such a plea would be admitted in Scotland, in answer to the statutory claim of interest. Such a claim is equally available in Scotland against the parties themselves, and against their bankrupt estates. It has been held in England, that interest is not due by the drawer or indorser of a bill or indorser of a note, except from the time its dishonour has been notified to him, or rather from a reasonable time after notice, though this last modification of the doctrine has been questioned². But in Scotland, interest is recoverable from the dates mentioned by statute against all the parties to bills or notes. Indeed, it would seem, even on general principles, that the drawer and indorsers, by making themselves responsible for the acceptor's or granter's failure in payment, become thereby liable for the interest chargeable against him, as a consequence of his failure.

It has been much discussed in England, whether interest should run only to the date of the action, or till final judgment be obtained. The latter seems to be now the rule³.

in bills or notes, and that the practice, which is to include such interest in letters of horning or other warrants for summary diligence, is correct.

¹ *Per* Bayley, J., in *Cameron v. Smith*, 2 B. and A. 308; *De Bellois v. Lord Waterpark*, Bayley, 351, note 45; 1 D. and R. 16.

² *Vide* *Walker v. Barnes*, and remarks on it, *ante*, 531.

³ *Vide* Lord Mansfield's opinion in *Robinson v. Bland*, 2 Burr. 1085-8.

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In Scotland, it runs in all cases till payment ¹. This rule, indeed, appears to be founded in justice, as there is no reason why a debtor who delays payment should be freed from interest after judgment, more than before it.

When interest on a bill or note is recovered by summary diligence, the whole sums included in the diligence, interest as well as principal, are accumulated into a new capital bearing interest, as soon as the debtor has been denounced, (on the expiry of the days of charge mentioned in the letters of horning ²;) for not obeying the precept which they contain to make payment. The form and mode of such denunciation is detailed by our institutional writers. The effect of it, according to the act 1621, c. 20, on whatever obligations it proceeds, is to make the whole sums for which the charge is given bear interest from the denunciation till payment. When therefore the interest is included in the charge given on a bill, it is joined with the principal, at the time of denunciation, into one sum, bearing interest from that date. But denunciation, to have such an effect, must be made at the head burgh of the shire where the debtor resides. It was formerly established in practice, that a denunciation at the market-cross of Edinburgh was sufficient, even against a debtor who was then within the kingdom, but resided in another county, to authorise a caption against his person for enforcing payment of the debt ³. But the proper denunciation is that made at the head burgh of the shire where he resides ⁴, excepting when he is out of the kingdom, in which case the denunciation was formerly made at the market-cross of Edinburgh, since that was held the *commune forum* for Scotsmen residing abroad. Accordingly, it has been decided, that the act 1621, c. 20, allowing interest on the sums contained in the horning after

¹ The act 1681, c. 20, enacts, that the sums on bills shall bear interest "ay and while the payment thereof."

² It may be mentioned, that though the charge is given, in the ordinary case, on six days, agreeably to the act 1681, this rule must be understood under the exception of the party's absence from Scotland, in which situation he is always entitled to *inducias* of sixty days; Ersk. ii. 5. 55.

³ Ersk. iv. 3. 12.

⁴ The act 1597, c. 286, expressly requires that all letters of horning be execute, (referring thereby, it is supposed, to the denunciation of such letters,) at the head burgh of the jurisdiction where the debtor resides.

denunciation, does not apply, unless when the denunciation is made at the head burgh of the jurisdiction in which the debtor resides¹. It is only indeed by such denunciation that he can be held to have that intimation which places him *in mora*, so as to make him justly liable in interest on the sums for which he is denounced. It has therefore been held, that the act 1621, c. 20, refers to such denunciations only as a ground for claiming interest. There is an exception from this rule, on the ground already mentioned, in case of the debtor being domiciled out of Scotland. But it has been decided that interest will not accrue, in such a case, unless the denunciation has been made at the pier and shore of Leith, as well as at the cross of Edinburgh². By 6 Geo. IV. c. 120, § 51, it is enacted, *inter alia*, that all charges and publications, (which include denunciations,) formerly given at the market-cross of Edinburgh, pier and shore of Leith, as against persons forth of Scotland, shall in future be given by delivering a copy at the office of the Keeper of Records of the Court of Session. Although the denunciation of a horning, to be good for certain purposes, must be registered³, yet, as the purpose of it in this case is merely to certiorate the debtor, that he may prevent the accumulation of interest by paying the debt, it has been found that a denunciation, even when not registered, will afford ground for accumulating interest in terms of the act 1621⁴.

The legal interest, 5 *per cent.*, is held to be contemplated, unless there is a stipulation to the contrary.

3. *Exchange and Re-exchange.*

1. *Exchange.*

The next claims connected with bills, not with promissory-notes, are for exchange and re-exchange. These claims arise as to bills drawn in a different place or country from that in which they are accepted and are payable.

¹ *Hutchison v. Dickson*, 26th Jan. 1665, *Morr.* 491; *Gordon v. Gordon*, 3d July 1711, *Morr.* 492. A contrary decision was given in an anonymous case, 17th Dec. 1686, *Morr.* 494. But the old rule seems to be now established by *Cochrane v. Vasse's Representatives*, July 1743, *Morr.* 494.

² *Watson v. Ramsay*, 17th Nov. 1747, *Morr.* 496.

³ 1597, c. 268.

⁴ *Smith v. Waugh*, 11th Feb. 1673, *Morr.* 491.

When a person residing in one place or country owes money to a party residing in another place or country, he does not in general pay his debt by transmitting the money, which would occasion expense and risk, but endeavours to find out some person who has money to receive in the place where his debt is payable, and, paying him the amount of the debt, gets from him in return a draft to the same amount on his debtor in favour of the person to whom his own debt is payable; which draft being sent to, and presented by the payee, and accepted and paid by the drawee, extinguishes the payee's claim on his debtor who procured the draft. If this debtor wishes also to bind himself to his creditor *ex facie* of the draft, he may take it payable to himself, and then indorse it to his creditor. Such a draft from one country to another, is a foreign bill, and from one place to another place in the same country, is an inland bill. These bills are easy or difficult to procure, according to the relations of debt or credit subsisting between the two places or countries betwixt which they are required. For instance, if, on the whole transactions between London and Paris, there are, at any time, more debts due from Paris to London than from London to Paris, a person in London who owes money to another person in Paris will have no difficulty in getting a draft on Paris for its amount, on paying the money to the drawer in London; on the contrary, the latter, having a debt due to him in Paris, and wishing to save the expense and risk of its transmission thence, will be glad to receive the money in London, on condition of giving a draft for it on Paris. In such a case, the number of persons in London willing to give such drafts for money paid to them in London will be greater than the number of persons wishing to purchase drafts; and hence, drafts on Paris will sell at a discount, or for less than the sum which they will entitle the holder to receive in Paris. This discount, which is in fact a sum paid by the maker of the draft to get ready money in London for an order of payment on his debtor in Paris, is called exchange, and the course of exchange is said, in this case, to be against Paris. It is also in favour of London, because the number of persons in Paris owing money in London, and wishing to purchase drafts payable in London to their creditors, being greater than that of persons in Paris who

have claims on London, and wish to sell such drafts, these drafts, not being supplied in proportion with the demand, will bear a *premium* in Paris, or a person who wishes a draft will pay more for it than the sum which it will entitle him to receive in London. This *premium* is likewise called exchange. On the other hand, if the debts due in Paris to persons in London are smaller than those due from London to Paris, drafts from London on Paris, being few in proportion to the demand for them by the persons wishing to pay debts at Paris by means of them, will be sold at a *premium*, and drafts from Paris on London being numerous in proportion to the demand for them, will be sold at a discount. In this case, the course of exchange is in favour of Paris, and against London. In all these cases, the balance due from the one country to the other, after setting off their mutual debts against each other, must be paid by the transmission of *specie*, or, which is the same thing, by buying drafts from bankers on their correspondents abroad, with whom they have a sufficient supply of money to meet the drafts. It is the expense of purchasing and transmitting this balance in *specie*, whether laid out or paid to the banker who furnishes it, which regulates the *premium* for drafts at a place against which the exchange is, and the corresponding discount on drafts at a place where the exchange is in its favour. The rate of exchange, therefore, so far as regards the balance to be sent from one country to another, is affected, not merely by the state of their mutual dealings, but also by the price of *specie* in the two countries, which enters into the expense of procuring and transmitting this balance. There is also another element, viz. the expression of the value of *specie* in the currency of the two countries, or the value of these different currencies compared to bullion, and consequently to each other. Lest there should be a fluctuation in this relative value betwixt the date of a bill and its term of payment, it is expedient, when the draft has been paid for in one currency, and is payable in another, to express in it the rate at which payment has been made, and at which the one currency is converted into the other, so that, if, from an intervening change in the relative value of the two currencies, the same amount of currency which was paid for the bills cannot be got for them at the term of payment, the drawer and in-

dorsers must make up the difference, as part of the value which they received¹. The acceptor, too, on the grounds to be immediately stated, must be liable to this consequence, as resulting from one of the stipulations in the bill which he has accepted.

2. Re-exchange.

This explanation will enable us to understand also what is meant by re-exchange. When a draft from one place on another is not accepted by the drawee, or, though accepted, is not paid, the person who has got it, in order to pay by means of it a debt due by him where it is made payable, must raise money there otherwise to satisfy his creditor; or, what is the same thing, the creditor, as holder of the dishonoured bill, is entitled to do so in order to pay himself. But the most natural way of doing so is to draw a new bill on the drawer of the dishonoured bill, and to sell this draft for money, to some person who wishes to make a payment, by such a draft, where it is made payable. If the debts due from the place where it is made, to the place where it is payable, are greater than those due from the latter to the former, the demand for such drafts will exceed the supply, and the drawer, instead of selling his draft at a discount, will get a *premium* for it. But, when the debts due from the place where it is payable, to the place where it is drawn, are greatest, there will be more persons wishing to raise money on such drafts, than to give money for them, and they will be sold at a discount. This *premium* or discount is also affected, as already stated, by any change betwixt the date of the bill and the term of payment, in the relative value of the currencies of the country where it is drawn and that where it is made payable. But, as full value has been paid for the original bill to the drawer, the holder is entitled, on its dishonour, to raise money to its full amount, at his expense, in whatever currency or at whatever rate of exchange it was payable; and therefore, if a re-draft on him for this amount cannot be sold but at a discount, the holder may add as much to his re-draft as will cover both the discount and the amount of the original bill. This sum so added to the re-draft is termed

¹ So found by the Lord Chancellor in *ex parte Hoffman*, Cooke, B. L. 194.

re-exchange. When a *premium*, or, in other words, when exchange has been paid for the original bill at the place where it was drawn, a re-draft, such as that now mentioned, at the place where the first bill was payable, must be sold at a discount; or, in other words, there must be re-exchange on it, (unless the course of exchange between the two places has altered during the interval); because the course of exchange must be against the place where the original bill was drawn, and in favour of the place where the re-draft is made. On the other hand, if the original bill has been sold at a discount, from the circumstance of the exchange being in favour of the place where it was drawn, and if the course of exchange has not been altered between the date of it and of the re-draft, the latter, instead of being sold at a discount, will bear a *premium*, and consequently no re-exchange can be charged against the drawer of the original bill. In the case supposed, the claim for re-exchange will correspond to the *premium* paid for the original bill. The drawer of the original bill is liable for re-exchange; because, as he has got full value for the bill, he must make good its amount where it was payable, to the person who gave value for it; or, in other words, must pay the re-draft for such a sum as will cover both this amount and the discount. His liability, too, will be the same, whether the re-draft has been made by the debtor who purchased the original bill, or by his creditor, as the person to whom that bill is payable, and who, therefore, as coming in right of his debtor, is entitled to re-draw for its amount. Any holder of the original bill being entitled to receive its amount at the place of payment, has also a right, failing payment of it, to raise its amount at that place at the drawer's expense by a re-draft on him¹.

These remarks as to exchange and re-exchange on foreign bills, apply equally to inland bills drawn from one place on another, as the course of exchange betwixt them depends on the same principles as betwixt one country and another. They are also applicable where a person gets an indorsation for value in one place, to a note granted by a party residing in another place, and payable there, but does not recover pay-

¹ The nature of exchange and re-exchange is explained very briefly and clearly by Pothier, *Contrât de Change*, Nos. 52 and 64.

ment ; for, in that case, he is entitled to raise the amount of the note in the place of payment by a re-draft on the indorser, and, if this can only be done by paying re-exchange, that must be chargeable against the indorser.

It is not necessary, to give the holder of the original bill a claim for re-exchange, that he should re-draw on the drawer of that bill ; for, although he has raised the amount of the bill otherwise, it will be presumed that he has incurred as much expense in doing so, as by a re-draft ¹. In one case ², re-exchange seems to have been found not due, as there was no re-draft. But it is justly observed ³, that such a re-draft is not required by the act 1681, and the decision would not now be followed. It is enough that there is a course of exchange betwixt the place where the original bill was drawn, and that where it is payable, by which the loss that the holder has suffered may be estimated. But, if there is no such exchange, either direct or circuitous, re-exchange cannot be claimed, because the holder of the bill could not have incurred any ⁴. He may, however, in such a case, be entitled to the damage incurred from not obtaining money for the bill at the place of payment, though not in name of re-exchange. But it will not be an objection against a claim for re-exchange, that there is no *direct* course of exchange ; for, if it is pos-

¹ In *De Tastet v. Baring*, 2 Campb. 65, 11 East. 265, where the question was, Whether the indorser of certain bills was liable to the indorsee for re-exchange? Lord Ellenborough left it to the jury to find re-exchange due, if the plaintiffs "had either paid or become liable for re-exchange themselves," and this direction was approved of by the Court. The case was decided on another ground, to be afterwards noticed.

² Forbes, 156-7, *Boick v. Blackwood*.

³ Forbes, *ibid*.

⁴ In the preceding case of *De Tastet v. Baring*, the claim of re-exchange was left with the jury, as depending on the fact, Whether there was then any course of exchange betwixt Lisbon, where the bill was payable, and London, where it was drawn ; and they rejected the claim, on the ground, (as the Court afterwards held,) that there was then no such course of exchange. At the time when the bill, which was drawn in London upon Lisbon, became payable, the latter place was in possession of the French, who had excluded the English from it, and it was blockaded by an English squadron. It became therefore a question, whether there could legally be any re-drawing, or consequently any re-exchange with a country which was then hostile to this country. But this question was not decided, the Court holding, as already mentioned, that the jury had decided on the ground of there not being then, in fact, any course of exchange betwixt Lisbon and this country.

sible to draw from the one place to the other circuitously, through another place, the holder will be entitled to the circuitous re-exchange thence arising, as it will be held to be his only expedient for raising the amount of the bill at the place where it ought to have been paid. In the case last cited¹, although there was an instance or two, when the bill in question was dishonoured, of an exchange of bills betwixt Lisbon and this country “through the medium of other bills on Ham-
“burgh and America,” the claim for re-exchange was rejected, as there was not then any regular course even of circuitous re-exchange. But, in another case², where a note had been accepted payable at Paris, Dover or London, according to the course of exchange on Paris, and, when the note became payable, the direct exchange between Paris and this country was interrupted by a war with France, the defendant was held liable, not by the direct course of exchange when the note was granted, but according to a circuitous course of exchange through Hamburgh, which was the only exchange that existed when it became payable. It might have been doubted, whether a re-draft from Paris on London would have been then lawful, seeing France was at war with this country. But the holder’s claim to circuitous re-exchange was sustained, from the necessity of the case.

No doubt, when, without such necessity, the holder re-draws circuitously for his own convenience, he cannot claim circuitous re-exchange. But, if the bill, before it reaches him, has been indorsed by several parties at different places, he is entitled to re-draw on the last indorser, or on any previous indorser, for its amount, and for re-exchange, as between the place of payment and such party’s residence ; and each indorser being entitled to re-draw thus on his previous indorser, (adding always to the re-draft the re-exchange between their respective places of residence,) the drawer, on whom the first indorser is entitled to draw, will thus be liable for the accumulation of all the different re-exchanges which have been incurred between the several indorsers. Thus, in the case³ of a bill

¹ *Antea*, 598, note 4.

² *Pollard v. Herries*, 3 Bos. and Pull. 335. The doctrine stated in the text was laid down, in this case, unanimously by the Court of Common Pleas.

³ *Mellish v. Simeon*, 2 H. Bl. 378, decided by the Court of Common Pleas.

drawn from London on Paris, which, after being indorsed to two parties at Amsterdam successively, came at last into the hands of a person in Paris, who, on its being dishonoured, re-drew for re-exchange on his indorser at Amsterdam, it was decided, that the original drawer in London was liable, not merely for direct re-exchange between London and Paris, but for the whole re-exchange occasioned by re-drawing circuitously through Amsterdam. It has been said, that the drawer ought not to be liable for any but the direct re-exchange between the place of drawing and the place of payment, unless he has given permission to negotiate the bill in other places¹. But such a permission is implied by the drawer issuing a negotiable document, since the holder for the time is entitled to indorse it to any person he pleases; and, on the other hand, the last holder, being entitled, in case of its dishonour, to re-draw on any previous indorser, in order to make good his recourse against such indorser, who again has a right to do the same with any prior indorser, the drawer, as he is liable for all the consequences of dishonour, must be liable for the accumulated re-exchange arising on the successive re-drafts, because that results from the negotiability of the document which he has issued.

The act 1681, c. 20, provides, that the holder of a bill shall be entitled, in case it is dishonoured, to recover both exchange and re-exchange. Exchange, as already explained, is the premium sometimes paid in one place for procuring a bill there to be paid in another place. But all which the holder of the bill can require, on the other hand, is, that he should get back the amount of the bill which he has thus bought. He is therefore entitled to re-exchange only as the necessary expense of raising the amount of it by a re-draft on the original drawer or the indorser. But, by thus getting its amount, he is fully indemnified, and is not entitled, *besides*, to the exchange, because that would be to repay him again part of the value given for the bill. The meaning of the act, as interpreted by Forbes², is, that, if the holder of a dishonoured bill gets exchange, or the amount of the *premium* which he has paid at the place of drawing, it must be deduct-

¹ Forbes, 156; Glen, 274-5, 2d edit.

² 154.

ed from the re-exchange claimed by him, so that he will get nothing as re-exchange but the sum by which the discount paid in raising money on the re-draft exceeds the *premium* paid for the original bill. There cannot be such an excess, unless the rate of exchange betwixt the two places has fluctuated between the dates of the draft and of the re-draft, since it has been shewn, that, if it remains the same, the discount on the re-draft must be equal to the *premium* on the bill. In this last case, the bill-holder, if he gets the amount of exchange, can have no separate claim for re-exchange. But, although this seems to be the true explanation of the act, the simplest way probably is, to consider re-exchange as meaning the whole discount, without deduction, which is paid in raising money on the re-draft, and to allow this alone, as is done in England, without reckoning any thing separately for exchange. The only case in which the other rule now mentioned must be adopted in Scotland, is where a certain sum is expressly mentioned in the bill as exchange, in which case there may, according to the act 1681, be summary diligence for it, as well as for the amount of the bill. In all other cases, it, as well as the re-exchange, which from its nature cannot be ascertained beforehand, is recoverable by ordinary action, or, according to the acts 1681 and 1696, may be added to the charge in case of a suspension.

Although the drawer and indorsers are undoubtedly liable for re-exchange, it has been much disputed whether the acceptor is liable. In England, it has been repeatedly held that he is not. The ground of these decisions appears to be, that the drawee, by his acceptance, becomes liable only for the sum in the bill with interest, and that re-exchange is a species of indirect damage, for which he is not bound¹. But it is in

¹ In *Napier v. Schneider*, 12 East. 420, which was an action against the acceptor of a bill drawn in Scotland and accepted in England, but not paid, the Court of King's Bench, on being moved to direct the Master to tax, not only principal, interest, and costs, but re-exchange, refused the last, saying that the acceptor only bound himself according to the law of the country where he accepted, leaving to the holder his recourse over against the drawer, and that they would only refer to the Master to compute what was due on the bill itself.

In *Woolsey v. De Crawford*, 2 Camp. 445, which was an action against the acceptor of a bill drawn at Quebec and accepted in England, the plaintiff having demanded 10 *per cent.* as re-exchange, which he said that he had been obliged

truth damage arising directly from the acceptor's breach of contract, being the expense of raising the amount of the bill in the readiest way, to obviate the consequences of its non-payment. It is not, therefore, like the case put in one of the decisions, where money is raised by mortgage in consequence of non-payment of the bill, since that is no necessary effect of non-payment. If the drawer or indorser is liable for such damage to the holder, there seems to be no reason why the acceptor, who is more immediately bound to him, should not also be liable for this direct consequence of his breach of contract. Farther, it has been justly remarked¹, that the acceptor would reap no benefit by being free from the holder's claim, since the drawer, who is liable to the holder, would have a claim of relief against him. But he appears to be directly liable for this claim, as much as the drawer. Accordingly, in the old law of France², he was liable for re-exchange, although the modern law of that country does not clearly enact his liability³. In England, a learned writer on bills of exchange⁴ suggests that he ought to pay it.

In an English case⁵, where certain bills had been drawn from Philadelphia on London, and accepted there, but not paid, and where it appeared that, by a law of Pennsylvania, the drawer and all concerned were liable for 20 *per cent.* advance, as damage, on all bills drawn on Europe and returned protested, (which sum was alleged to be partly on account of re-exchange, as there was no course of exchange with London, where the bills were payable,) the Lord Chancellor decided,

to pay, Lord Ellenborough observed, " You may as well state, that, by reason " of the bill not being paid, the plaintiff was obliged to raise money by mortgage." His Lordship then proceeded to say, that the proper recourse for such claim is against the drawer, who " undertakes that the bill shall be paid, or that " he will indemnify the holder against the consequences," but that the acceptor's contract is only to pay the sum in the bill, with interest at the legal rate, when it is due. A similar opinion was intimated by Lord Tenterden in *Dawson v. Morgan*, 9 B. and Cr. 618.

¹ Bell, 407.

² Pothier, No. 117. *Depuys de la Serra*, Chap. 15, and Chap. 16, § 1, 2.

³ *Vide* Code de Commerce, T. 8, § 13, No. 182, which seems rather to imply that the drawer and indorsers are alone liable for re-exchange.

⁴ Bayley, 353, note 49.

⁵ *Francis v. Rucker, Ambler*, 672. The same case is cited in 2 Brown's Chancery Cases, 599. But the account of it given there is taken from the Report by Ambler.

that the drawer, who had drawn the bills by desire of a third party in payment of a debt due to him, was entitled to prove for this claim of damage on the acceptor's bankrupt estate, he alleging that he had paid or was liable to pay it. The decision turned on a question peculiar to English bankrupt law, viz. whether such a claim was a contingent debt, or an actual debt at the time of the original contract. But it was admitted to be a good claim against the acceptor, whether against his bankrupt estate or not. This case seems to prove that the drawer at least is entitled to claim re-exchange from the acceptor. It has been said ¹, that the decision was given on the ground of the claim in question consisting of conventional damage. That ground of decision, however, was admitted only as to the ranking of the claim on the acceptor's estate, in order to prove that it was a subsisting claim at the date of the bill, which, by the law of England, might be ranked, not a contingent claim, which could not have been ranked. But it was not disputed that such a claim, whether contingent or not, would have been competent against the acceptor. Though called a claim of damage, it included re-exchange; and indeed re-exchange, in all cases, is a species of damage. But, if the acceptor is liable for it to the drawer, he seems to be equally liable to the holder.

It has been urged ², against the acceptor's liability for it, that he has no concern with the loss which the drawer or indorser may sustain by being obliged to repay more as re-exchange than they have got as exchange, as that arises from the circumstance of the drawer taking payment of his debt, by a bill with which the acceptor, being liable to him merely in the debt, has no concern. This argument, however, *1st*, is opposed to the decision now cited, which implies that *the drawer* has a claim against the acceptor for re-exchange. *2dly*, It is not applicable to the *indorser's* claim for re-exchange; because an indorser has no concern with the acceptor's original debt to the drawer, but looks only at the absolute acceptance which, on non-payment, must subject the acceptor to re-exchange, as damage arising from his breach of acceptance. *3dly*, Even as to the drawer, the acceptor substitutes his absolute acceptance, with all its consequences, for the original debt. He

¹ Glen, 272, 2d edition, note.

² Ibid.

is primary debtor ; and whatever damage the drawer and indorsers are liable for to the holder from his non-payment, he must refund, as they were entitled to rely on the fulfilment of his acceptance. To the drawer his liability for re-exchange as damage is more direct, inasmuch as he is directly liable to him under his original obligation. But it has been said farther, that the drawer or holder receives value for the re-exchange, if he recovers the amount of the bill from the acceptor at the place of payment, as its amount there is just what it would be *plus* the re-exchange, if payment were made at the place where it was drawn. This remark does not include the case where the acceptor makes payment at a different place from the proper place of payment ; and indeed it is admitted, that, in such a case, he must pay re-exchange between the place of actual payment and the place where it should have been made. Moreover, with reference to the case of payment being made at the proper place, it is here erroneously assumed, that the acceptor pays the bill when re-exchange is incurred by the re-draft, whereas it is his non-payment that makes the re-draft necessary. Although, therefore, payment of the bill by him at the time of the re-draft might cover the re-exchange due then, it may not do so afterwards, because it may be recovered, (after a re-draft has been made at a certain discount,) when it bears a smaller discount ; and when, therefore, cash at the place of payment is proportionally of less value than at the time of the re-draft. The holder or any party in right of the bill is entitled to recover from the acceptor the difference occasioned by this fluctuation, as they have suffered loss to that extent through his failure to pay. But, besides, the argument now stated overlooks the accumulated re-exchange arising from re-drafts that may be made circuitously, first by the holder on his immediate indorser, and then by each indorser on the prior indorser up to the drawer. Such re-drawing, with all the re-exchange consequent on it, has been held chargeable against the drawer or any indorser with whom the re-drawing terminates, in respect of their having drawn or indorsed an instrument which was thus negotiable ; and the same claim seems to be competent against the acceptor, from his acceptance of it. He is liable therefore, *nomine damni*, for all re-exchange, whether direct or circuitous, in-

curring by the person who holds the bill when payment is recovered from him.

In the case ¹ of a bill for 2800 star pagodas drawn in this country on India, discounted in India by the payee with the plaintiffs, who gave him the then current rate of exchange for it, the bill being returned protested for non-acceptance, the plaintiffs were found entitled to claim from the defendant at the rate of 10s. *per* pagoda, besides 5 *per cent.* on its amount from the expiration of thirty days after notice to him of its return, this rate being established by usage in such cases, in order to cover exchange, interest, and all incidental charges. There does not appear to be any separate rate of re-exchange between this country and India.

4. Damage and expenses.

The act 1681, c. 20, farther authorises the recovery of damage and expenses, by an ordinary action, or by adding them to the charge in case of a suspension. Damage refers to nothing but the direct loss occasioned by want of the money, and cannot relate to consequential loss, for instance, to the privation of profit which the holder might have got by employing the proceeds of the bill in some commercial speculation. In an old case ², it was decided that damage was not necessarily restricted to the legal interest. When a bill drawn abroad on England has been dishonoured only in part, damage is allowed only in proportion to the sum for which it is dishonoured, not on its whole amount ³. Under the head of expense, on the other hand, are comprehended all expenses incurred through non-payment of the bill or note, such as the expense of protesting and notifying its dishonour, the commission paid for an agent's trouble in raising money on the re-draft, &c. The rule as to the expenses of diligence on bankers' notes has been already explained ⁴. It has been decided in England, that an indorser is not entitled to recover from the acceptor the costs of an action against him by the last indorsee, though the result, (it was said,) would have been different, if the acceptor had applied to stay proceedings against

¹ *Auriol v. Thomas*, 2 T. R. 52, decided by the Court of King's Bench.

² *Boick v. Blackwood*, 11th May 1695, 4 Brown's Suppl. 240.

³ *Laing v. Barclay*, 3 Stark. 41.

⁴ *Antea*, 577.

himself¹. In another case², where an accommodation-acceptor of a bill had been obliged to pay the costs of two arrests, by an indorsee, one against himself, and the other against the party for whom he had accepted, he was found not entitled to recover these costs against a party who was held to have improperly given it to the holder, in respect that he should have paid it to the holder immediately, without costs.

It has been said, that the drawer is not liable to re-exchange, if payment should fail through the acceptor's intervening death; because re-exchange is a species of damage, and he ought not to be made liable in damage for an occurrence which he could not foresee or prevent³. But, as both the drawer and indorser guarantee payment absolutely, they should be liable for re-exchange on non-payment. It is claimed from them not *in pœnam*, but as a reparation to the holder for non-performance of the contract which they have guaranteed. Even the acceptor's estate appears to be liable for re-exchange in such a case, since he was bound to have left funds to meet his acceptance⁴.

¹ Dawson v. Morgan, 9 B. and Cr. 618; but *vide* Chitty, p. 349-50, and cases there cited.

² Roach v. Thompson, 4 C. and Pay. 194, 1 M. and Malk. 468. *Vide* also to the same effect Blenden v. Charles, 7 Bingh. 246; and Stoven v. Taylor, 1 Nev. and Mann. 250. But *vide* Chitty, 349-50, and cases there cited.

³ Forbes, 157-8, who cites Kennedy v. Hutchison, 8th July 1664, Morr. 1497, where the payment of a bill having been retarded by the acceptor's death, the Court found that there was neither exchange nor re-exchange, as there was no *mora*; but that the drawer, as well as the acceptor's representatives, were liable only in the single value. It may be doubted whether this decision would be now followed.

⁴ As to the question, how far these claims bear interest, *vide* Chapter on Bankruptcy.

SECTION IV.

Proof against the several Parties to Bills or Notes, and Mode of Proof in the two cases of Diligence or Action.

1. It must be proved that the bill or note was made or executed. It is necessary in most cases to do this by the best evidence, viz. the document. But, if it has been lost or destroyed, its contents may be established, as already mentioned¹, by a proving of the tenor. In such a process, writings referring to the writ which has been lost are sometimes necessary, as adminicles of evidence, to shew that it existed. But, in personal obligations, to which often no other writings bear reference, such adminicles are dispensed with, and parole evidence of their contents is accounted sufficient². A copy of the bill, if it can be procured, will be admitted as good evidence³. As the only thing required for summary diligence is, that, in recording the protest, *a copy* of the bill or note should be prefixed, and as a protest may be validly taken on a copy when the original cannot be had⁴, it would appear that there is no objection of form to summary diligence, after the genuineness of the copy has been ascertained by a proving of the tenor. But it has been already shewn⁵, that even this is not sufficient with bills or notes payable to the bearer, or blank indorsed, unless they are destroyed, without the pursuer finding security, to be adjusted in an action, against their re-appearance, and, although they should be destroyed, their destruction must also be ascertained by an action, the decree in which will afford ground for summary diligence, so as to render the ordinary diligence on a registration of the protest superfluous. Even when a lost bill or note is payable to a certain individual, or specially indorsed, it would still appear to be necessary,

¹ *Antea*, 319, *et seq.*

² *Ersk.* iv. l. 55; *Tait on Evidence*, 208.

³ Such doctrine was held by Holt, C. J., 1 Lord Raym. 731, in a case where the defendant had torn his own note.

⁴ *Antea*, 417.

⁵ *Antea*, 321.

before he can recover, that he should not only prove the tenor of it, but find security in an action that he will not indorse it in case of its re-appearance¹. There does not therefore seem to be any case in which there is room for diligence on such a bill or note by registration of the protest.

It has been held in England², that a copy cannot be read as evidence without proof of the genuineness of the original. This rule seems to follow, from the English doctrine, that, even when the original is extant, the signatures must be proved. In Scotland, where the genuineness of the original would be presumed, it seems sufficient, unless forgery is alleged, to prove that a document bearing certain signatures once existed, and that the document produced is a true copy of it³. It is said, that, in England, in an action on a bill or note which is in the defendant's possession, the plaintiff will not be allowed to prove its contents, unless he has given the defendant notice to produce the original⁴. But, in Scotland, the action of proving the tenor, which is required in all such cases, implies a notice to the defender to produce the original document, if he has it, and therefore a more formal notice is unnecessary. This is also held in England, when the form of the action implies notice to the defendant to produce the document, as in an action of trover for recovery of it, which implies that it is in his possession, and calls on him to deliver it⁵.

In an action⁶ against parties who had discounted a bill, founded on an undertaking by them to account for the proceeds to the plaintiff, and proved by a letter, in which they

¹ *Antea*, 321. But, as to proving the tenor, *vide* case of *Maberly*, 322-3.

² *Goodier v. Lake*, 1 Atk. 446.

³ *Ersk. iv.* 1. 59.

⁴ *Chitty*, 616. *Vide* *Partridge v. Coates*, 1 R. and M. 156, where parole evidence of the contents of a check was allowed, on notice having been given to the creditor to produce it.

⁵ The contrary was at first ruled in *Cowan v. Abraham*, 1 Esp. 50, where Lord Kenyon, and afterwards the Court of King's Bench, held, that such notice to the defendant was necessary, even in an action of trover. But, in a subsequent case, *How and others v. Hall*, 14 East. 274, the contrary was settled after full consideration. This last doctrine had been also previously held in *Jolley v. Taylor*, 1 Campb. 143; and in *Bucher v. Jarrat*, 3 Bos. and Pull. 143.

⁶ *Hunt v. Alewyn*, 1 M. and Pay. 433.

acknowledged the amount of proceeds in their hands, it was held that the plaintiff was not bound to produce the bill, (as it was in the hands of the acceptor, who had paid it, and might be treated as a lost bill,) but that he might give parole evidence of its contents.

2. When the original bill or note is forthcoming, it is not necessary in Scotland, as in England, to prove the signatures of the parties. The document is held to be probative, both as to the genuineness of the date and of the signatures, unless it is alleged that they are not genuine. In that case, it would appear that the party alleging forgery must prove it, otherwise the genuineness of the signatures will be presumed¹. But, if a party admitting or assuming that the signature is not genuine, alleges that it was adopted by the suspender or defender, he must prove that fact². This rule applies, under the limitations already mentioned³, even where a proving of the tenor becomes necessary from the want of the original. When summary diligence is used, such proof is impossible; because, as has been already shewn, there is no action in which it could be adduced.

The presumption, that the signatures are genuine, is applicable to indorsements, when founded on to complete the holder's right; for instance to an indorsement, whether general or special, by the payee to the holder. It will likewise be presumed, in case of action or diligence on a bill or note payable to a particular person or specially indorsed, that the possessor of the document is payee or special indorsee, although that presumption may be redargued by contrary evidence. The debtor, however, cannot safely pay to the possessor of the bill or note, without being certain that he is *in*

¹ *Vide Alison v. Gordon*, 17th Dec. 1701, Morr. 16705-6, where the proof appears to have been thrown on, and undertaken by, the person alleging the forgery. The same course appears to have been followed, since jury trial was introduced in Scotland. *Vide Hepburn v. Cowan*, 14th July 1817, 1 Murr. 261; *Lindsay v. Gilchrist and Black*, 12th July 1822, 2 Murr. 97; *Syme v. Marshall*, 26th Sept. 1825, 2 Murr. 536; *Rathbones v. Glenny*, 18th March 1833, 11 S. D. B. 574.

² *Rathbones v. Glenny*, preceding note; *M'Nab v. Telfer*, 18th June 1821, 2 Murr. 479.

³ *Antea*, 607-8.

titulo of it, because the latter cannot otherwise give a valid discharge of the debt.

Although there is thus a presumption in favour both of the holder's right and of the obligations arising from the several signatures, this presumption may be redargued,

1. By proving that any of the signatures is not genuine. Such a forgery is truly no signature. No reduction therefore is necessary to absolve him, as the signature is not his deed. Its falsehood may be pleaded by exception, either in defence against an action, or as a ground for suspending diligence¹. If the Court is satisfied of the forgery from inspecting the document, they will pass the suspension, without caution².

The mode of proceeding with reference to such an exception, which is applicable also to other deeds, need not be here detailed³. One part of the procedure is, that the party claiming must, in order to have benefit by the deed, abide by it formally as genuine. The effect of this, according to the ancient practice⁴, was, that, if forgery was proved, the holder, without farther proof of his accession to it, became punishable as a forger. But such a consequence is now avoided, by permitting the holder to abide by the deed, either under some special qualification, or under protestation that he shall be allowed to prove circumstances which shew that the deed came fairly into his hands. In one case⁵, where a charge on a bill was suspended on the ground that the acceptance was forged, the Court refused to allow the charger to abide by the bill, under this special qualification, that the bill was brought to

¹ In *Alison v. Gordon*, 17th Dec. 1701, *Morr.* 16705, forgery was allowed to be proved in a suspension of a charge on a bill. *Vide* a detail of this case in *Forbes*, 32-6. In *Robertson v. Alison*, 7th Dec. 1743, *Morr.* 6774, and *A v. B*, 16th June 1747, *Morr.* *ibid.*, forgery was also allowed to be proponed by exception in a process of suspension, although, in the latter case, there appear to have been, besides, separate processes of improbation. Indeed, the competency of proponing falsehood by exception is recognised so early as the act 1557, c. 63, which contemplates the proponing of it in this way, as well as by way of action. *Vide* the same doctrine in *Stair*, iv. 41. 39; *Bankton*, i. 10. 217; *Ersk.* iv. 4. 68.

² *Wilson v. Mitchell*, 17th Dec. 1825, 4 S. and D. 327; *Bruce v. Borthwick*, 3d March 1827, 5 S. and D. 517. *Vide* cases on this subject, *ut supra*, 555.

³ *Vide Erskine*, iv. 4. 68, 69.

⁴ *Ibid.* iv. 4. 69.

⁵ *Robertson v. Alison*, note 1.

him by a co-acceptor, who had got the money. But they allowed him to abide by it under a protest that he should be allowed to prove circumstances inferring his innocence. In a subsequent case¹, the Court allowed the charger to abide by a bill under a qualification of certain special circumstances which inferred his innocence. In the first of these cases, it was pleaded, and probably formed a ground of judgment, that the truth of the qualification proponed was not inconsistent with the holder's guilt. This decision, however, establishes the competency of protesting generally for a proof of circumstances inferring innocence; and the other decision recognises the right to abide by the deed under qualification of such circumstances as infer innocence. Both decisions seem to imply, that a person abiding by a deed which turns out to be forged, will be liable to the pains of forgery, unless he *proves* circumstances inferring his innocence; inasmuch as, from his abiding by the writ after being certiorated of the objection of forgery, he must be presumed, unless he proves his innocence, to have knowingly uttered a forged document. But there is no reason to believe that such a rule would be now enforced.

In a reduction of the signatures to certain bills on the ground of forgery, it has been decided to be a sufficient abiding by the defender, to state, that he believes the signatures to be the pursuer's genuine signatures, or, at least, that, if not adhibited by him, they were adhibited by his daughter with his authority².

In a suspension on the ground of forgery³, it has been held that the proper form of process is, to make up a record on articles improbatory and approbatory, (with notes of pleas,) which are held as condescendences.

It was an old rule in the law of Scotland, *exceptio falsi est omnium ultima*. But, in a recent case⁴, where a suspender first pleaded that his acceptance was forged, and afterwards that the indorsation to the charger was null, as having been made by a wife without her husband's consent, it was decided,

¹ A v. B, 16th June 1747, 610, note 1.

² Paterson v. Montrose Bank, 8th July 1828, 6 S. D. 1096.

³ Golder v. Deans, 19th Dec. 1826, 5 S. and D. 161.

⁴ Binny v. Smith, 26th Jan. 1836, 14 S. D. B. 355, F. C.

that, if the maxim now cited was at all admissible under the present form of process, which requires that all defences be stated at once, it could only apply where a separate record had been first made up on the plea of forgery, and the charger called on to abide by the writ, but could not prevent the suspender from making up a record on the plea of forgery, and other pleas together, so as to be entitled to urge these pleas, without renouncing the plea of forgery. The objection to the indorsation was, in this case, sustained.

Proof of forgery *comparatione literarum* is held not to be sufficient, without the evidence also of persons who knew the party's handwriting ¹.

It may be urged against payment of a bill or note,

2. That it has been altered or erased *in essentialibus* since it was signed. The grounds and limits of this defence have been already explained ². It may be pleaded either against an action, or in a suspension of a charge, without a reduction of the bill or note ³; for it implies, that the bill or note, not being the instrument which the objector subscribed, is not truly his obligation, and cannot, though unreduced, be effectual against him.

It has been held not competent, in order to prove the alteration or erasure of a bill or note, to ask any question as to other bills or notes alleged to have been altered, because this is to try other issues, which the opposite party is not prepared to meet ⁴.

3. Although a party should have signed a bill or note, he will not be bound if he has not given his consent, as where he has been forced to sign, or is incapable of giving it, or has been incapacitated by law, as in the case of a pupil, or a minor without consent of his curators, or a married woman ⁵. In all these cases, it may be pleaded at once, by way of de-

¹ Greig v. Clark, 19th June 1829, 7 S. and D. 773.

² *Antea*, 70, and 179, *et seq.*

³ In Graham v. Gillespie and Co., 27th Jan. 1795, Morr. 1453, the effect of a vitiation such as that now mentioned was discussed in the suspension of a charge on the bill. There does not, indeed, appear to have been ever any objection made against the competency of discussing it in this form.

⁴ Thompson v. Moseley, 5 C. and Pay. 501, and *Nisi Prius* cases there referred to.

⁵ Smith v. Binny, 611, note 4.

fence or suspension, that the bill or note is not the deed of the party'. But although a bill or note has been obtained by fraud or circumvention, yet, if the debtor's consent has been given, so as to render his obligation effectual to an onerous indorsee, it may be doubted whether a reduction is not necessary, even as to the party who obtained it; as it does not appear how an obligation, subsisting and transmissible, can be otherwise done away. In one case¹, where a bill was alleged to have been granted under the threat of a law-suit, for an exorbitant sum, as the amount of damages occasioned by a trespass, there was a reduction, as well as a suspension. In another case², a reduction was resorted to, to set aside a bill obtained from a person of weak mind, through fraud and circumvention. In a case³, where an obligant in a bill pleaded that he had signed it when intoxicated, this was held to form no defence against an onerous indorsee, as drunkenness is but a temporary incapacity, and might be often made a pretence for challenging bills. As there was held to be an obligation in this case, it may be doubted whether it could have been nullified, even against the party who impetrated it, without a reduction. In another case, indeed⁴, where a bill was said to have been impetrated from the granter by fraud and circumvention, and *ob turpem causam*, while he was intoxicated, the Court repelled the objection that such a plea was not competent in a suspension. But there was here the defence of *turpis causa*, which afforded alone a sufficient reason for refusing action or diligence. The Court farther refused to allow the charger to prove the *debt* in the suspension by the suspender's oath, as the suspension related only to the validity of the *diligence* on the bill. They reserved to him his claim in an ordinary action. But the objection of *turpis causa*, which existed in this case, is different

¹ In *Wightman v. Graham*, 6th Dec. 1787, *Morr.* 1521, where a bill was said to have been obtained through concussion, this plea was stated successfully, without a reduction, in defence against an action for payment of the bill. In an English case, *Sentance v. Poole*, 3 C. and P., a note drawn in an unusual form, and signed by a party who was proved to be utterly imbecile, was held to be void, even in the hands of an onerous indorsee.

² *Foreman v. Sheriff*, 24th May 1791, *Morr.* 16515.

³ *McIlwham v. Ker*, 22d Feb. 1823, 2 S. and D. 240.

⁴ *Wilson and Fraser v. Nisbet*, 1 Fol. Dict. 98.

⁵ *Hamilton v. Main*, 3d June 1823, 2 S. and D. 357.

from the objection of fraud; for consent, though fraudulently obtained, when given, cannot be set aside without a reduction. The fraud may, indeed, be established in a suspension, by the writ or oath of the party guilty of it, so as to prove that he holds the bill or note without value, and thus found a personal objection against his claim. But a suspension does not seem competent except to this special effect, and when limited to that mode of proof.

A reduction is also necessary when the right of challenge is a personal privilege, as with regard to obligations granted by a minor having no curators, or with consent of his curators, or indorsations reducible under the acts 1621 or 1696; for, in all these cases, there is a subsisting obligation, which remains good till challenged.

4. When a bill or note is granted for a consideration void at common law, as for an immoral consideration, or one declared illegal by statute, as for a smuggling consideration, or for money won at play, or for usury¹, there is a nullity in all cases against the party privy to the illegality, and in some cases by express statute, against third parties, which may be pleaded by way of defence or suspension². In cases of usury, this mode of pleading is competent as to the nullity of the obligation. But the treble penalties likewise imposed by the 12 Anne cannot be recovered but by an action, the right to bring which prescribes within a year from the time of committing the usury³.

When a party discounting a bill retains more than the legal discount, usury will be presumed, and, if he alleges that the money was retained on account of a separate transaction, this ground of defence can be sustained, only on his proving it⁴.

¹ But on this subject, *vide* the opinions of the Court in *Ballantyne and Co. v. Abud and Sons*, 15th Jan. 1828, 6 S. and D. 384, *antea*, 141, note 2.

² In *Morrison v. Commissioners of the Customs*, 27th Nov. 1723, *Morr.* 9533, the objection to a bill that it was granted for a smuggling consideration, was stated in a suspension. The same in *Wilkie v. M'Neil*, 6th Nov. 1748, *Morr.* 9538; also in two other cases, *Morr.* 9554 and 9555. In *Nelson v. Bruce*, and *Stewart v. Hislop*, *Morr.* 9507, and *M'Coull v. Braidwood*, *ibid.* 9518, it was pleaded, in suspension of a charge on bills, that they had been granted for gaming debts; and, though the plea was repelled, the competency of stating it in this form was not disputed.

³ *Antea*, 151.

⁴ *Vide* opinions of the Court, in *Christie v. Harley*, 12th Feb. 1836, 14 S. D. B. 472.

3. The holder of a bill or note, when he brings action or diligence on it against the drawer and indorsers, must prove that he has duly negotiated it, and notified its dishonour to the party whom he sues. By the statutes already cited, he is entitled to raise summary diligence against all the parties to bills or notes, without any previous proof except the registration of the protest. But, if negotiation or notice is denied, whether in an action or a suspension, he must instruct both.

1st, He must prove that the bill or note was duly presented and protested. In England, where it is not indispensable to protest inland bills or promissory-notes, the presentment of them may be proved by parole evidence¹. But an instrument of protest is the only evidence of presentment in foreign bills. In Scotland, where a protest is required both as to foreign and inland bills and promissory-notes, no evidence of presentment but an instrument of protest is admitted. The form and requisites of such an instrument have been already explained². Objections to a protest and the diligence raised on it have been found competent, though not stated in the Bill-Chamber, the bill and protest not having been produced till the letters of suspension were expedited³.

2d, The holder must establish that he has given notice. The requisites of due notice, as well as the kind of evidence necessary for proving it, were formerly detailed⁴.

It remains to be considered,

4. When parties to a bill or note are competent witnesses against another party to it?

In Scotland, there is not much occasion for witnesses regarding bills or notes; because they are probative without witnesses, and cannot in general be redargued by them. But witnesses are competent, *inter alia*, to prove that a signature is forged, or that the bill or note, though written on a foreign stamp, was drawn in this country, or that it was granted for an unlawful consideration, or in order to establish or disprove the fact of notice. It becomes, therefore, important to ascertain what witnesses are admissible in these or other cases.

¹ *Vide Parker v. Gordon*, 7 East. 385.

² *Antea*, 442, *et seq.*

³ *Russell v. Kirk*, 27th Nov. 1827, 6 S. and P. 133.

⁴ *Antea*, 468, *et seq.*

The general rules as to the competency of witnesses need not be here detailed¹; but we shall only consider the competency of parties to bills or notes as witnesses regarding them, which arises naturally out of the present subject. On this point there are few decisions in Scotland, and the English decisions must be cited with great caution. But several of them appear to proceed on general principles of evidence applicable in Scotland as well as in England.

Witnesses cannot be objected to as parties to a bill or note, unless they have thereby a direct interest in the result of the process. On this ground of direct interest, it was held in one Scotch case², where a charge on a bill had been suspended on an allegation of forgery, that the suspender could not adduce his cautioner in the suspension, though it was said that the principal was solvent, and that there was another suspension with a different cautioner, since the witness was still bound as cautioner in the first suspension. In another case³, where a party who had accepted a bill in favour of a bank agent, which the latter afterwards indorsed to his constituents, suspended a charge for its amount, on the averment that it had been altered after being indorsed to the bank, and offered to prove this by the bank agent, the Court held that this evidence of a party interested to get quit of the claim of relief which the acceptor would have against him, if found liable, was inadmissible. He might, no doubt, have been liable at any rate, in an accounting to the bank; but this was not so direct and liquid as a claim of relief for the amount of the bill.

The doctrine regarding the effect of interest, as well as the converse of it, has been adopted in many English cases. Thus, in an action by the indorsee against the acceptor of a bill granted for the drawer's accommodation⁴, it was held incompetent to adduce the drawer, to prove that the bill had been indorsed for a usurious consideration, though it was ur-

¹ *Vide* Tait's Law of Evidence.

² *Alison v. Gordon*, 17th Dec. 1701, Morr 16705.

³ *McKenzie v. British Linen Co.*, 29th Nov. 1825, 4 S. and D. 231, F. C.

⁴ *Jones v. Brooke*, 4 Taunt. 464; *vide* also to the same effect, *Hardwick v. Blanchard*, 1 Gow, 113; *Hall v. Cecil*, 6 Bingh. 181; *Burgess v. Cuthill*, 1 Mood. and Robins. 315, and 6 C. and P. 282.

ged that he had the same interest whether the action succeeded or failed, as he would be liable, in the former case, to the acceptor, and, in the latter case, to the plaintiff, his own evidence not affording him any defence in a new action. It was held, that he had an interest to defeat the existing action ; because, if it succeeded, he would be liable to the acceptor *for the expenses of it*, besides the principal sum. This decision appears to be inconsistent with two previous judgments¹, by which the Court of King's Bench admitted the indorser of a bill on the ground of his being liable for the sum at issue, in whatever way the action was decided, either to the plaintiff or to the defendant, although it appeared that, if the defendant was found liable, he would, besides, be subjected to him in expenses. But the other decision appears to be most correct. The doctrine of it was followed² in an action against the drawer of a bill by the holder, to whom the bill had been delivered by a person who had bought goods from him. The defence was, that this person had given the bill, not in payment of the goods, but to raise money on it for the acceptor, to accommodate whom it had been drawn ; and this person, from whom the plaintiff got it, was offered as a witness to prove that he had given it for that purpose. But he was rejected ; because, though he was liable to the plaintiff, if the action failed, for the price of the goods, and, if it succeeded, was liable to the defendant for repetition of such part of the bill as was paid on account of them, yet, in the latter case, he was also liable to the defendant, by way of damages, for the costs of the action, so that he had an interest to defeat it. In another case³, of an action by the indorsee against the indorser of a bill, the person in security of whose debt to the plaintiff, (and consequently for whose accommodation,) the defendant had indorsed the bill, was decided to be an incompetent witness for him ; because, though

¹ *Ilderson v. Atkinson*, 7 T. R. 480 ; *Birt v. Kershaw*, 2 East. 458. The latter case only related to a bill ; but both cases involved the point mentioned in the text. The doctrine of these cases appears to have been also adopted by Lord Ellenborough in *Shuttleworth v. Stephens*, 1 Campb. 407 ; but in that case the liability of the witness for the defendant's expenses, if the latter failed in the action, was not pleaded.

² *Harman v. Lasbrey*, Holt, 390.

³ *Bottomley v. Wilson*, 3 Stark. 148.

he was equally liable for the principal sum, whether the action failed or succeeded, he was interested to defeat it on the ground, that if it succeeded, he would be liable to indemnify the defendant for the expenses of it. The same rule was adopted¹, regarding the admissibility of the acceptor of a bill, in an action by the indorsee against the drawer, to prove an alleged transaction, by which the plaintiff was to have no right to hold the bill for a debt of £.70, due to him by the acceptor, the bill being for £.198, unless on condition that he got cash for the bill, which he had not done,—it being held that the witness had an interest to swear against the plaintiff, as he would be otherwise obliged, (besides his liability for the bill,) to indemnify the defendant for the costs of the action. The rule therefore appears to be fully established.

A release by the acceptor to the drawer, in the circumstances now mentioned, or the erasure of an obligant's name from a joint note, has been held to qualify him as a witness². In a recent prosecution against a person who had signed as drawer of a bill, for forging the names of two parties as acceptors, a release to them by the onerous holder was held to qualify them as witnesses, though it was said that the prisoner might still have a claim against them as drawer³. It has been decided, that a release granted to a party after he had become bankrupt was sufficient to qualify him, without any release to his assignees, because the creditor was precluded by the release from making any claim on his estate⁴. In an action against two acceptors, one of them, who had become bankrupt, and pleaded his certificate, (upon which the plaintiff entered a *nolle prosequi*,) having released his interest in the surplus of the effects, was found a competent witness against the other, who was barred by the certificate from making any claim against him⁵. The same rule would probably be followed as to the effect of a release in Scotland granted to a bankrupt after sequestration. A statutory discharge to the bankrupt, under

¹ Edmonds v. Lowe, 8 B. and Cr. 407.

² Hardwick v. Blanchard, 616, note 4; also Sewell v. Stubbs, 1 C. and P. 73.

³ Rex v. Bayley, 1 C. and P. 435.

⁴ Cartwright v. Williams, 2 Stark. 340, per Lord Ellenborough; Scott v. Lifford, 1 Campb. 249.

⁵ Aflalo v. Fourdrinier, 3 M. and Pay. 743.

a sequestration, would have equal effect, as it releases the bankrupt, not only from the bill, but from all claim for expenses on it, these being consequential to the principal claim. This has been decided in England, as to the effect of a certificate granted under a commission of bankruptcy ¹.

There are many illustrations of the rule converse to that now mentioned, viz. that any party to a bill or note is admissible, either when he has no interest in the question at issue, or when his interest is against the party who calls him, or when his interest is the same in whatever way the case is decided. Thus, in an action by the indorsee against the acceptors of a bill, the payee and indorser was admitted to prove a ground of nullity arising against the bill under the stamp laws, as his evidence could not defend him from a new action by the plaintiff on the same bill ². It has been also decided, that one of two joint makers of a promissory-note is a good witness against his co-obligant ³, since he is liable to the co-obligant for one-half, if the latter be subjected to the holder, or, if he escapes, and the witness is then subjected for the whole in a new action, he will still be ultimately liable only for one-half, as he will have a claim of relief against his co-obligant for the other half. A similar decision was given lately in favour of the competency of an indorser of a bill, to prove notice to a previous indorser against his own interest ⁴. It has been also decided, in Scotland ⁵, that, when a husband was, or was alleged to be the indorser of a bill, his wife was an admissible witness to prove the forgery of the acceptance, it being held that, to this effect, she was adduced against his interest, as the acceptor was bound to free him from the bill if the acceptance was genuine, whereas, if it was forged, he would be liable alone on his indorsation.

In one case, however ⁶, of an action by the indorsee against

¹ *Brind v. Bacon*, 5 Taunt. 183; *vide also* *Moody v. King and Porter*, 2 B. and Cr. 558, 4 D. and R. 36; *Ashton v. Longes*, 1 M. and Malk. 127; *Bassett v. Dodgin*, 9 Bingh. 653, 2 M. and Scott, 777.

² *Jordaine v. Lashbrooke* and another, 7 T. R. 601. A similar decision was given in *Cropley v. Corner*, 4 C. and Pay. 21.

³ *York and another v. Blott*, 5 M. and S. 71.

⁴ *Meyer v. Meuken*, Gow, 183.

⁵ *Gavin v. Montgomerie*, 17th Dec. 1830, 9 S. D. 213.

⁶ *Maundrell v. Kennett*, 1 Campb. 408, note, *per* Bayley, J.

the maker of a promissory-note, where the payee and indorser was adduced to prove that it was an accommodation-note, and had been indorsed to the plaintiff after it fell due, (which, by the law of England, would make him liable to the same exceptions as the original holder,) the witness was rejected, because it appeared that he had obtained his certificate under a commission of bankruptcy since the date of the note, so that he was thus freed from all claim by the holder, to which he would have been otherwise liable, while, if the defendant was found liable, he must reimburse him, as the note was for his accommodation, so that he had thus an interest to defeat the action. But, in an action¹ against the acceptor of a bill drawn in favour of a company, by a person to whom it was alleged that one of the partners had indorsed it for his private debt, the other partner was admitted as a witness to prove the indorsement, as his interest was held to be the same on either side, seeing that, if the defendant was found liable, and took credit for the amount of the bill against him, he would have a claim for reimbursement against his partner on account of his fraud; and, if the defendant was not liable, he would escape altogether. In an action likewise by the indorsee against the payee and indorser of a promissory-note, Lord Mansfield admitted the maker to prove an alteration in the date; since his evidence, though it might free the defendant, could not protect himself in a new action². In another action, by the indorsee of a note against the indorser, the granter, as being liable to one or other of the parties, whether the action succeeded or failed, was admitted against the defendant, to prove notice³. But it was decided, in an action by the indorsee against the drawer of a bill, that one of the acceptors could not be admitted to prove compensation by a bill drawn by the acceptors on, and accepted by the plaintiff, and thereafter indorsed to the defendant, being interested in diminishing the balance claimable from the defendant, as he would be liable to reimburse him for it⁴.

The drawer has been held a competent witness, in an action

¹ *Ridley v. Taylor*, 13 East. 181-2.

² *Levi v. Essex*, 1775, Chitty, 654, note A.

³ *Venning v. Shuttleworth*, 1796, Bayley, 536, note 10.

⁴ *Mainwaring v. Mytton*, 1 Stark. 83.

against the acceptor, either for the plaintiff or defendant; since, if the latter is found liable, he will escape, or if the defendant gets free, and the drawer is subjected to the holder in a separate action, (wherein his own evidence would not avail him,) he will still have his reimbursement from the acceptor¹. In an action, too, against the drawer², who pleaded want of notice, the acceptor was admitted to prove that his acceptance had been given without value, in order to excuse the want of notice, it being the same to him, whether he was liable to a new action by the holder, if the action against the drawer failed, or to an action of relief by the drawer if it succeeded.

¹ In *Rich v. Topping*, Peake, 224, 1 Esp. 175, being an action by an indorsee against the acceptor, the drawer and indorser of a bill, (accepted, as is supposed, for his accommodation,) having been released by the acceptor, was admitted to prove that it had been indorsed to the plaintiff for a usurious consideration. In this case, he could gain nothing by his evidence, because he was liable at any rate to a separate action by the plaintiff. In *Brown v. Ackermann*, 5 Esp. 119, the drawer and indorser of a bill, though he had no release from the acceptor, was admitted, in an action by an indorsee against the acceptor, to prove that he had indorsed the bill to the plaintiff for a usurious cause. As this bill does not appear to have been accepted for the drawer's accommodation, the witness seems to have been, with respect to interest, in the situation mentioned in the text. In *Charrington v. Milner*, Peake, 6, the same rule was followed, by admitting the payee and indorser of a promissory-note, in an action by an indorsee against the maker, to prove that he had made payment to the indorsee; for he would still have been liable to the plaintiff in a separate action, wherein his own evidence would not avail him, and then he would have had his recourse against the maker. In *Humphry v. Moxon*, Peake, 52, the drawer was admitted to prove payment in an action against the indorser, though with some doubt by Lord Kenyon, as it appeared that he was still liable, and as it was supposed that his evidence might discharge his own liability. But it does not appear how his evidence could have been admitted with such a view, in a separate action brought against him. In *Barber v. Gingell*, 3 Esp. 61, the drawer was admitted, in an action against the acceptor, without any release, to prove payment; and in *Poole v. Bonsfield*, 1 Campb. 55, he was admitted by Lord Ellenborough, in an action by the payee against the acceptor, to prove that the plaintiff had discharged the drawer from part of the bill, and the acceptor as to the residue, knowing that the consideration had been divided between them. In *Dickenson v. Prentice*, 4 Esp. 32, the drawer was admitted, in an action against the acceptor, to prove the latter's handwriting; *vide* Bayley, 533-5. The same rule was followed in *Bagnall v. Andrews*, 7 Bingh. 217, where it was held that the bill had not been accepted for the drawer's accommodation, as, upon the state of accounts, it was found that he had, at the time, reason to expect that his draft would be accepted; *vide* also *Wilshire v. Cox*, Chitty, 657, note *A*, and *Fancourt v. Bull*, 1 Bingh. N. S. 681.

² *Staples v. Okines*, 1 Esp. 332.

In three other cases of actions against the drawer, an indorser was admitted as a witness for the plaintiff¹, being equally indifferent to the result of such an action against the drawer, as the drawer could be to a similar action against the acceptor. But, in the first of these cases, he was adduced against his interest, to prove his own indorsement.

There is one case, where a witness, though his legal rights were held to be the same in whatever way the action terminated, was yet rejected on the ground of interest², in respect that he would be exposed to less risk of an action in one event than in the other. But it has been since remarked, that the objection arising in this case may “more properly be considered as having a strong influence on the witness, but not “as forming any solid objection to his competency³.” It is almost needless to observe, that there can be no objection to examining a party to a bill or note, against his interest⁴.

In some of the cases now cited, witnesses were admitted to establish facts, as to which parole evidence in Scotland would have been incompetent or unnecessary; for instance, to prove the handwriting of a party, to instruct payment, or to depone that the bill or note was not granted for value. But the principles on which witnesses were admitted in these cases, for one party or other, are the same that would regulate their admissibility in Scotland, in those questions regarding bills or notes in which parole evidence is competent.

It was once laid down in England, that, after a party had signed a negotiable instrument, and thus lent his name to give it currency, he could not give evidence to invalidate it⁵. But that doctrine is not now adopted. Thus, in some of the cases already cited⁶, indorsers of bills and notes have been

¹ *Richardson v. Allan*, 2 Stark. 334; *Stevens v. Lynch*, 2 Campb. 332; *Hewitt v. Thomson*, 2 C. and Pay. 372.

² *Buckland v. Tankard*, 5 T. R. 578.

³ 1 Phillips' *Law of Evidence*, 68, 5th ed.

⁴ This was stated, in *Richardson v. Allan*, note I, as a ground for examining an indorser, in an action by an indorsee against the drawer, to prove his own indorsement.

⁵ In *Walton v. Shelley*, 1 T. R. 296, it was decided that the indorser of certain notes could not be adduced to prove that they were granted for a usurious cause.

⁶ *Rich v. Topping*, and *Brown v. Ackermann*, 621, note 1.

admitted to prove that they were indorsed for a usurious cause, and they would be equally admissible to prove that the indorsement was made for a gaming consideration¹. It has been also decided, in an action by the indorsee against the acceptors of a bill, that the payee and indorser is a competent witness to prove that the bill, though dated in Hamburgh, was drawn in London, so that, as it was unstamped, it could not be received in evidence². In Scotland, as parole evidence regarding bills or notes is limited to certain special cases, there is less danger in admitting even parties who have signed them to invalidate them, in those cases where parole evidence is competent.

¹ *Per* Lord Kenyon in *Jordaine v. Lashbrooke*, 7 T. R. 603.

² *Jordaine v. Lashbrooke*, 7 T. R. 601. In *Adams v. Lingard*, Peake, 117, the same opinion had been expressed by Lord Kenyon, in an action by the indorsee against the acceptor of bills, as to the competency of proving, by the payee and indorser, that the bills, though dated at Madeira, were granted in London. Buller, J., on the grounds stated in the text, held that such evidence was incompetent; but its competency was settled afterwards by *Jordaine v. Lashbrooke*.

CHAPTER VIII.

PRESCRIPTION OF BILLS AND NOTES.

THE want of a definite term of prescription for bills and notes was early felt in Scotland. As they were destitute of those solemnities which the law of Scotland required in more formal deeds, it was not safe that they should endure, like such deeds, for forty years, because there was more risk, with them, of forgery or vitiation, after the lapse of time had rendered detection less probable. Besides, as the principal use of bills and notes, especially of foreign bills, which were first introduced, was held to consist in the quick transmission and speedy settlement of claims, there was the less hardship in limiting them by a short prescription, when they could not, from their nature, be intended to subsist as permanent securities. In England, it was enacted, at an early period¹, that the greater number of personal actions should prescribe, if not pursued within six years after the cause of action accrued; and this enactment included bills of exchange. In Scotland, on the other hand, there was no general prescription, except the long prescription of forty years, which included every cause of action; but various personal grounds of action were subjected to separate prescriptions of different periods. No such short prescription, however, was fixed for the duration of bills, even after the establishment of summary execution, both on foreign and inland bills, had shewn that they were regarded as obligations which ought to be speedily enforced, and had given the means of so enforcing them. Mr Forbes, indeed², seems to think that bills were or ought to have been comprehended under the vicennial prescription of holograph deeds.

¹ 21 James I. c. 16.² 177.

But Sir George Mackenzie¹ states, from recollection, that "the Parliament expressly refused to limit bills of exchange "to this time," (twenty years.) He indeed gives a different reason for this from what might be expected. "Though "these," he continues, "be holograph papers, because these "being the vehicles and support of trade betwixt us and foreigners, that were to limit them by too narrow statutes." The first statement in this passage is inaccurate, since bills never were required to be holograph. Farther, as they are not necessarily holograph, and ought, from their nature, to be speedily negotiated, there was good ground for subjecting them even to a shorter prescription than holograph writs. But, though these reasons for exempting them from the vicennial prescription are insufficient, there can be no doubt that they were so exempted, and this was accordingly decided in a case cited by Mr Forbes².

As a substitute, however, for a short prescription, our lawyers seem to have adopted the principle, that, as bills, from their nature as commercial documents, ought to be of short duration, so, when they exceeded such a duration, they forfeited those privileges, (whether as probative writs or otherwise,) which the interests of commerce alone rendered it necessary to confer on them. This doctrine is laid down by Lord Stair³, and was followed more or less till the sexennial prescription of bills or notes was established. But there was an endless fluctuation of judgments as to the period in which a bill lost all its privileges; and, indeed, in most instances, this matter was decided, not merely with reference to the duration of the bill, but with regard to all the other circumstances of the case, as, for instance, to the fact of the original obligant being alive or dead, of his denying his subscription or not, or of his alleging payment. Those who wish to examine the grounds, (not very consistent with each other, or with any fixed principle,) on which the Court sometimes sustained, and at other times refused action on such bills or notes, may consult the cases cited below⁴. The law on this subject

¹ Obs. on Parl. 2 C. II. Sess. 1, act 9.

² *Lesley v. Mensies*, 4th Feb. 1692, Forbes, 177, Morr. 16971.

³ iv. 42, 6.

⁴ *Colquhoun v. Duke of Argyle*, 21st Jan. 1767, Morr. 1645; *Moncrieff*,

remained in great uncertainty, till the 12 Geo. III. c. 72, (made perpetual as to bills and notes by 23 Geo. III. c. 18, § 55,) which, proceeding on the preamble, that “ the not li-
“ miting bills and promissory-notes to a moderate endurance,
“ in that part of Great Britain called Scotland, has been
“ found by experience to be attended with great inconve-
“ niences,” therefore enacts, “ That no bill of exchange, or
“ inland bill, or promissory-note, executed after the said 15th
“ day of May 1772, shall be of force, or effectual to produce
“ any diligence or action in that part of Great Britain called
“ Scotland, unless such diligence shall be raised and executed,
“ or action commenced thereon, within the space of six years
“ from and after the terms at which the sums in the said bills
“ or notes became exigible.”

It is likewise enacted by § 38, “ That no bill of exchange,
“ or inland bill, or promissory-note, which has been or shall
“ be granted before the said 15th day of May 1772, shall
“ be of force, or effectual to produce any diligence or action,
“ unless such diligence has been or shall be raised, or action
“ has or shall be commenced thereon, before the expiration
“ of six years from and after the said 15th day of May 1772.”

But it is provided by § 39, “ That no notes commonly
“ called bank-notes, or post bills, issued or to be issued by
“ any bank or banking company, and which contain an obli-
“ gation of payment to the bearer, and are circulated as
“ money, shall be comprehended under the foresaid limitation
“ or prescription ; and that it shall and may be lawful and
“ competent, at any time after the expiration of the said six

7th Jan. 1752, Kilk. 91 ; *Lookup v. Crombie and Creditors*, 10th Feb. 1754, Morr. 1635 ; *Gordon v. Rigg*, 11th Feb. 1747, Morr. 1648, (reversed on appeal on special grounds, Cr. and Stew. App. Cas. 415) ; *Wallace and Crawford v. Lees and Crawford*, 31st Jan. 1749, Morr. 1631 ; *Stewart v. Houston's Trustees*, 15th July 1760, Morr. 1638 ; *Wemyss v. M'Naughton*, 13th June 1766, Morr. 1644 ; *Wallace v. Murray*, 9th Jan. 1759, Morr. 1637 ; *Ker v. Ker*, 5th August 1768, Morr. 1648, in all of which action was dismissed ; *Forrester v. Elphinstone*, 13th Nov. 1742, Cl. Home, 342 ; *Elchies*, No. 27, v. Bill, where the claim was defeated by the defender's oath ; and, on the other hand, *Maxwell*, 21st Jan. 1767, Morr. 1645 ; *Swan v. Campbell*, 5th July 1734, Morr. 1627 ; *Hamilton*, 10th Dec. 1757, Morr. 1636 ; *Farquhar v. Crawford*, 28th Feb. 1751, Morr. 1635 ; *Hedderwick v. Strachan*, June 1728, Morr. 1626, and *Pringle v. Murray*, 18th Nov. 1760, Morr. 1648, in which action was sustained.

“ years, in either of the cases before mentioned, to prove the debts contained in the said bills and promissory-notes, and that the same are resting owing, by the oaths or writs of the debtor.”

It is also enacted by § 40, “ That the years of the minority of the creditors in such notes or bills shall not be computed in the said six years.”

The six years of prescription, according to the terms of this act, run from the time when bills or notes “ become exigible.” Bills or notes payable at a fixed term are not “ exigible” till the last day of grace, or, if that day falls on a Sunday or holiday, till the day preceding. The six years, therefore, with all such bills or notes, run from the last day of grace, or, in the case last mentioned, from the day preceding ¹. So, a bill payable on demand being “ exigible” whenever it is issued, it has been decided that the six years run from its date ². This matter does not depend on the question already discussed ³, whether the creditor in such a bill or note may raise an action on it without making a demand; but on the time when he *may* exact payment, which he may do from the date of issuing. In a bill or note payable at sight, the six years cannot begin to run till after presentment, because the bill or note does not become “ exigible” till presentment; and, if days of grace are allowed on such bills or notes ⁴, the six years cannot begin till the last day of grace, as in bills or notes payable at a fixed term. This rule undoubtedly applies to bills or notes payable at a certain time after sight or presentment ⁵.

To prevent hardship in the case of bills granted before the

¹ This point was so decided in *Douglas, Heron and Company v. Grant's Trustees*, 19th Nov. 1793, *Morr.* 11133; affirmed in the House of Lords, 6 *Brown's Parl. Cas.* 276.

² *Stephenson v. Stephenson's Trustees*, 16th June 1807, *Morr. App. to Bill*, No. 20. A similar decision is said, in a note to the report of this case, to have been pronounced on the same day, in *Cook v. M'Janet*.

³ *Antea*, 383, *et seq.*

⁴ *Antea*, 377-8.

⁵ *Ibid.* A contrary rule to that now laid down regarding bills payable on demand was adopted in England, under the statute of limitations, as to a note payable “ 24 months after demand,” in *Thorpe v. Booth*, 1 R. and M. 386, it being held, in that case, that the limitation of the note run only from the lapse of 24 months after demand made. But this case is different from that of a bill payable *immediately* on demand.

date of the act, it enacts, that bills or notes granted before 15th May 1772, shall not be effectual unless diligence or action be raised on them within six years from that date. But this clause was intended merely as an indulgence, that bills or notes granted previous to the act might have a currency of six years after its date, though their term of payment should have arrived before the act. It was not meant to apply to bills or notes granted before 15th May 1772, but of which the term of payment did not arrive till after that date; these being comprehended under the preceding clause, which declares the six years to run from the time when bills or notes became exigible, and thus gives them a currency of six years from their term of payment, as much as if they had been granted after 15th May 1772. The true meaning of the clause in question, when connected with this general clause, seems to be, that bills and notes granted after 15th May 1772 must be made the ground of action or diligence, either, like other bills or notes, within six years from their term of payment, agreeably to the general enactment, or in six years after 15th May 1772, agreeably to the other clause, when it becomes necessary, from their term of payment being previous to the date of the act, in order to give them a currency of six years. It was, therefore, decided¹, in the case of a bill granted *before* 15th May 1772, viz. in April 1772, but not payable till after May 1772, viz. ninety days after date, that its efficacy depended on raising diligence or action upon it, within six years after its term of payment, and not after 15th May 1772.

¹ Tweedie and others v. Gibson, 5th March 1782, Morr. 11125.

SECTION I.

Interruption of Prescription by Diligence or Action, and its effect when not interrupted.

The act 12 Geo. III. c. 72, provides, that, to preserve the efficacy of a bill or note, diligence must be "raised and executed, or action commenced thereon," within the period of six years, as already explained. Nothing but diligence or action will be sufficient. For instance, it does not interrupt prescription, that, on an application by the alleged creditor to the trustees of the alleged debtor, he writes a letter with a state of his claim, which is unnoticed till the years of prescription have elapsed¹. Diligence, to be effectual as an interruption, must be complete. It will not therefore be enough to raise letters of horning, without giving a charge on them. It has been decided, that letters of horning without a charge, though a suspension was raised *by the debtor*, did not interrupt prescription of a holograph bond²; and the same rule appears to be deducible from the words of the statute as to bills and notes. It has been also held³, that the registration of a protest, not followed by diligence, did not interrupt prescription. There was not here diligence "raised and executed;" the registration was merely a preliminary step to diligence; and though it is declared by statute to form the ground of diligence, as if it had been a decree of registration, yet it is not therefore equivalent to a decree in an action, but has merely the special effect conferred on it by statute. Any diligence, whether by horning, or by arrestment, poinding, or inhibition, appears sufficient to interrupt prescription, since the statute refers generally to any diligence "raised and executed." The production of an extract from the register of hornings, with a caption, has been held sufficient evidence of the execution of diligence for this purpose⁴. A charge on a precept issued by a Sheriff on the protest regis-

¹ Ewing v. Cumine and others, 12th Nov. 1835, 14 S. D. B. 1.

² Wright v. Wright, 11th Dec. 1717, Morr. 11268.

³ Douglas, Heron and Co. v. Richardson, 26th Nov. 1784, Morr. 11127.

⁴ Thomson v. Easton, &c. 17th June 1831, 9 S. D. B. 759.

tered in his own court, is sufficient interruption¹. So is a charge given on a registered protest, though followed by no farther steps till after the six years, when another charge was given on new diligence². A charge given on a bill by a bank which was then the holder, interrupts prescription, even in favour of a prior obligant, who gets the bill under a blank re-indorsation by the bank, and sues on it against the drawer's representative³. A charge given to one obligant interrupts prescription as to all the obligants, as well as their representatives⁴.

The action necessary to interrupt prescription must be raised by the creditor. A suspension, by the debtor, of a horning raised but not executed by the creditor, will create no interruption⁵. It is enough that action has been "commenced." A citation, therefore, to appear in Court, will be sufficient, although it, if not followed by other proceedings, will prescribe, unless renewed within seven years⁶. When the process has been called in Court, the claim will in future be liable to no prescription, but the long prescription of forty years. An action cannot be held as "commenced," in terms of the act, unless both the summons and execution are complete. It has been therefore decided⁷, that a summons on a bill was not effectual to interrupt prescription, when the execution of it was not subscribed by the witnesses, in terms of the act 1686, c. 4. The summons, too, must refer specially to the bill or note, it being required that action shall be commenced "thereon;" and therefore it has been held⁸, that a citation on a blank admiral precept cannot interrupt prescription. As the bill or note is supposed still to subsist, the summons, in such a case, ought to be libelled on it, and not merely on the debt contained in it.

In order to commence action to the effect of interrupting

¹ *Henderson v. Stewart*, 14th Dec. 1830, 9 S. D. B. 180.

² *Fraser v. Urquhart*, 11th June 1831, 9 S. D. B. 723.

³ *M'Lachlan v. Henderson or Thomson*, 16th June 1831, 9 S. D. B. 753.

⁴ *Soutars v. Soutar*, 29th June 1827, F. C.

⁵ *Wright v. Wright*, 630, note 2; *Scott v. Brown*, 12th Dec. 1828; 7 S. and D. 192.

⁶ 1669, c. 10.

⁷ *Baillie v. Doig*, 2d March 1790, *Morr.* 11286.

⁸ *Gordon v. Bogle*, 23d June 1784, *Morr.* 11127.

prescription, it is not necessary that the holder should raise a separate action on the bill or note, provided he makes a judicial demand on which decree can be competently pronounced in his favour, though in a process brought for his benefit in common with other creditors. It has therefore been decided, that prescription on a bill is interrupted by production of the bill and registered protest in a process for ranking and sale of the debtor's estate¹. The same effect follows from lodging a bill or note, and an oath of verity, with the interim factor in a sequestration, or the sheriff-clerk acting as such, or the trustee; it being declared by the bankrupt act², that such productions of the grounds of debt, with an oath of verity, "shall have the same effect as to interrupting prescription of every kind, from the period of such production, as if a proper action had been raised on the said grounds of debt against the bankrupt and against the trustee." But it has been decided³, that production of the bill at a meeting of creditors, held to choose a trustee, where neither the interim-factor nor the sheriff-clerk were present, (it being lodged with the preses of the meeting as the ground for voting, and marked by him,) was not such a production, in terms of the statute, as interrupted prescription against all the parties to it, like other action or diligence. It was suggested incidentally, that, as the bankruptcy produced a *non volentia agendi* as to the bankrupt, such production might, perhaps, be equivalent to an action as to him. But there was no occasion to decide this point, as the bankrupt's trustees acknowledged the debt. It was decided, in the same case, that recall of the sequestration did not destroy the effect of production of the bill while the sequestration subsisted. A claim made in a multiplepounding brought for distribution of the debtor's funds, or generally "in any other process of competition⁴;" would seem to be equally effectual. It is said to have been decided in two cases by Lords Ordinary⁵, that pleading compensation on a bill or

¹ Douglas, Heron and Co. v. Richardson, 26th Nov. 1784, Morr. 11127.

² 54 Geo. III. c. 137, § 52.

³ Robertson and others v. Clark and others, 25th May 1827, F. C. Same case reported as Crawford's Trustees v. Haig and others; 5 S. and D. 705.

⁴ 1 Bell, 393.

⁵ These decisions, as I am informed, were given in one case by Lord Corehouse, and in another by Lord Cockburn.

note, being equivalent to an action on them, interrupted prescription. It would appear to have been held, in one case, that legal proceedings commenced on a bill in England did not interrupt prescription. But the grounds of judgment on that point are not stated¹.

A decree competently obtained within the years of prescription against one of the acceptors in a bill, interrupts prescription as to all of them; as it implies that action has been "commenced" in terms of the statute, which does not distinguish between its commencement against one of the parties, or against the whole². But any decree, to be an effectual interruption, must be obtained by the creditor in the bill or note. Thus, although the debtor in certain bills brought an action against his son, who had been taken bound to relieve him from them, and obtained decree of relief within the years of prescription, this decree was found of no avail to the creditor's representative in an action by him against the original debtor's grandson, to interrupt prescription, although the creditor, along with other creditors whose claims were the subject of the action of relief, had produced the bills in that action, and deposed to the verity of their debts³. The decree of relief was held to be *res inter alios acta*, of which the creditor, being no party to the action, could not avail himself. It was also held that the decree, being merely for relief, could not imply the subsistence of the debt during the six years; since the primary debtor, who sued for relief, might have afterwards paid the bills, and the process of relief would have been necessary, though he had paid them before it was raised.

When no diligence is raised and executed, or action commenced, within six years on a bill or note, it then ceases to be "of force, or effectual to produce any diligence or action." An action may, indeed, be brought, after expiry of the six years, for the debt, and be made good in the manner to be afterwards explained. But a decree obtained in absence in an action for the bill will afford no ground for di-

¹ Hunter v. Duff's Trustees, 9th June 1831, 9 S. D. B. 703.

² This point was decided in Gordon v. Bogle, 23d June 1784, Morr. 11127. Vide also Soutars v. Soutar, 29th June 1827, F. C., and 5 S. D. 876, as to diligence.

³ Viscount Arbuthnot v. Douglas, 3d March 1795, Morr. 11133.

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ligence, either against the debtor's estate or his person ; and a charge given on it will be suspended without caution or consignation ¹. An adjudication brought on a bill, after lapse of the six years, and taken without any previous decree constituting the debt, has been reduced as inept ². Nor can prescribed bills produced in a ranking and sale at the instance of the debtor's apparent heir be constituted by the heir's oath, so as to entitle them to be ranked ³. But a decree in absence, produced in a ranking and sale of the debtor's estate, has been held to afford good *prima facie* evidence in a question with the common agent, when the debtor does not object ; for the plea of prescription is personal to him ; and, if he does not challenge the decree, he may be presumed to forbear from knowing that the debt can be proved by his oath ⁴. The same principle seems to have been applied ⁵, where a party being bound by a separate letter for payment of a bill, which had undergone the sexennial prescription, but on which decree in absence had, notwithstanding, been obtained against the two acceptors, the guarantee was found not entitled to plead that the bill, which was the principal obligation, was extinguished, and that, therefore, his accessory obligation was also extinguished. The decree in absence was probably held, for the reason stated in the preceding case, to be *prima facie* evidence of the subsistence of the debt. But, though such a decree may preclude a party bound for the debt, by a separate obligation, from pleading its extinction, it cannot constitute the debt against obligants who are not parties to the decree.

¹ 1 Bell, 394. *M'Nicoll v. M'Neill*, 29th Nov. 1821, 1 S. and B. 175.

² *Scott v. Brown*, 12th Dec. 1828, 7 S. and D. 192.

³ *Little*, 4th Feb. 1826, 4 S. and D. 424.

⁴ This point is said to have been thus decided in the case of *E. Black and others v. The Common Agent in the Ranking of Shaud's Creditors*, 16th Jan. 1823, 2 S. and D. 118.

⁵ *Howison v. Howison*, 7th Dec. 1784, *Morr.* 11030.

SECTION II.

Proof of the Debt notwithstanding Prescription.

Although the bill or note becomes ineffectual, by lapse of the six years, the debt is not extinguished. 1st, If the claim for which it is granted has been constituted, either before or after the date of the bill or note, by a separate obligation, which would have afforded distinct ground of action or diligence, that obligation will remain, without reference to the bill or note, unless there is reason to believe that this document was taken as a substitute for it. Thus ¹, where the debtor in a bill, at the time of granting it, likewise subscribed a doquetted account distinct from it, in which he admitted the debt, the Court sustained action for the debt, although the bill was prescribed. It would appear, indeed, that the majority of the Court here adopted a doctrine which has been shaken by later cases, viz. that this doquet should be taken, in connection with the bill, as an acknowledgment by the debtor's writ of the debt contained in it, without regard to its having been granted before expiry of the six years. But, independently of this ground of judgment, the doquet appears to have been effectual as a separate obligation. In another case ², where a bill had been granted for payment of a sum previously due under a clause of warrandice in a conveyance of lands, as confirmed by a decree-arbitral, the Court, holding that the original obligation subsisted, gave effect to an action brought upon it, although the bill was prescribed.

In a case ³, where the holder of a promissory-note was also heir of entail to the granter of it, under a deed which gave him (the holder) power to burden the entailed estate with the debts due by the entailer at his death, and the note in question was an unprescribed debt of his at his death, though prescribed before the date of the action, the Court decided that he was entitled, after the years of prescription, to

¹ Campbell v. Campbell and Stewart, 19th May 1797, Morr. 1648.

² Sinclair v. Sinclair, 19th Dec. 1823, 2 S. and D. 600.

³ Lord Strathallan v. Drummond, 29th May 1828, 6 S. D. 881.

burden the entailed estate with it, under the power given to him, the executrix of the granter admitting, by letter, that she had not paid it. The debt being unexpired at the granter's death, it was held that the deed in question gave the holder an unlimited power to keep it up against the estate. In a later case ¹, where the holder of a bill then unexpired, acceded to a trust-deed for creditors, in which the debt was narrated, and it was recognised by letters and various acts of the trustees, as well as in a reconveyance to the truster's heir, after his death, it was decided, that neither the intervening prescription of the bill, nor the fact of its having been written on a wrong stamp, could be pleaded against the debt.

It has been also pleaded ², that the sexennial prescription is not applicable to a claim, by a party to certain bills, founded on a letter of relief granted to him by other parties to those bills. But, in this case, there was also a partial payment after the years of prescription, an acknowledgment that there was some balance due, and diligence raised, which last was held to interrupt prescription.

2dly, The statute provides a mode of proving the debt in any bill or note, even after the years of prescription. To understand the enactment on this subject, it must be compared with the preceding enactment. That enactment bears, that unless diligence or action is brought within six years, as already explained, the bill or note shall be no longer "of force, or effectual to produce diligence or action." But it is thereafter provided, "that it shall and may be lawful and competent, at any time after the expiration of the six years, to prove the debts contained in the said bills and promissory-notes, and that *the same are resting owing*, by the oaths or writs of the debtor." These enactments were not meant to interfere with any distinct obligation which the creditor might have for the debt contained in the bill or note. But when there is no such obligation, the statute establishes a presumption, from the mere lapse of six years, that the debt in the bill or note has been paid, inasmuch as it gives the creditor no means of proving the debt, but the debtor's writ or

¹ *Ettles v. Robertson*, 15th Feb. 1833, 11 S. D. B. 397.

² *Soutars v. Soutar*, 29th June 1827, 5 S. and D. 876.

oath, not only as to its constitution, but as to its being still "*resting owing*." A failure in this last point would be fatal, though he should establish the first. During the currency of the six years, the creditor's possession of the bill or note establishes the claim against the debtor, and he must prove payment. But, after the six years, the bill or note is no longer a ground of action, and leaves no presumption even of a debt, unless it is proved in the mode prescribed.

The debtor's oath will not avail the creditor, unless he either depones expressly that the debt is resting owing, or states facts which lead necessarily to that conclusion. The debtor's writ, likewise, in order to have the effect required by statute, must instruct that the debt is "*resting owing*." It has been found that this is sufficiently instructed by any written acknowledgment of the debtor subsequent to the six years, that the debt subsisted at its date; for such writing raises a new presumption against him, which he must redargue by shewing that the debt has been paid. Thus ¹, a letter written by a debtor to the creditor after the six years, requesting him "to send a copy of the bill, and the payments made on "the back of it, so that he might settle the balance," was held to support an action for payment of this balance; and a letter granted after the six years, agreeing to pay a composition on the debt, has been held to establish resting owing ², or a letter referring to another debt, but acknowledging the debt in question by implication ³.

The same effect has been justly given to markings of interest, made *after lapse of the six years*, in the debtor's handwriting ⁴; for these markings amount to an acknowledgment by his writ that the principal sum was due after the six years, and therefore afford evidence that it is still resting owing, unless he proves the contrary. Similar markings of partial payments to account of the principal sum, made and en-

¹ Russell v. Fairie, 23d May 1792, Morr. 11130.

² Mackenzie v. Noble, 15th Feb. 1827, 5 S. and D. 367.

³ Elder v. Marshall, 3d Dec. 1830, 9 S. D. B. 133.

⁴ In Ferguson v. Bethune, 7th March 1811, F. C., action for the amount of certain bills was sustained, in consequence of markings of interest made on the bills in the debtor's handwriting, and, in one case, entered in his books, after the lapse of six years.

tered after the six years, have the same effect, as they imply an acknowledgment of the balance of the debt. Thus ¹, where the representative of the original debtor in a bill had made a partial payment after the six years, and marked it on the bill with his own hand, the Court sustained action for the balance, in respect of "the partial payment of the debt in question, " subsequent to the running of the sexennial prescription, and " other circumstances of the case." In another case ², already noticed, where it was decided that such markings during the currency of the six years did not interrupt prescription, it was implied that they would have established the debt, had they been dated after the six years. Such markings, however, to be effectual, must be made by the debtor, or, if he is dead, by his representative, in order to render him liable ³. Markings of interest by the debtor's factor will have no effect, although the payments to which they refer have been regularly entered in the factory accounts ⁴. But entries of such payments made in the debtor's books by his clerk after the six years have been held to prove resting owing; the debtor's books, whether kept by himself, or by a person acting under him, being properly his writ ⁵.

In a ranking and sale of a deceased debtor's estate, brought by his eldest son and heir, where a claim was made for creditors on certain bills and open accounts which were prescribed, it was found incompetent to refer them, (viz. their contraction as well as their subsistence,) to the oath of the heir, who had been a pupil when they were contracted, and was still a minor ⁶. But, in another case ⁷, the Court sustained a reference to the oath of certain trustees as to resting owing on a prescribed bill by the deceased truster, reserving, however, all questions as to the effect of their oath, and excluding one of the trustees who had allowed decree against him as a joint acceptor of the bill, on the ground that he had an interest to be relieved to the extent of one half of it. On the

¹ Scott v. Gray, 3d Feb. 1784, Morr. 11126.

² Russell v. Fairie, 637, note 1.

³ Scott v. Gray, note 1.

⁴ Ferguson v. Bethune, 7th March 1811, F. C.

⁵ Blair and others in ranking of Shaw's Creditors, 16th Jan. 1823, 2 S. and D. 118.

⁶ Little v. Graham and others, 4th Feb. 1826, 4 S. and D. 424.

⁷ Murray v. Lawrie's Trustees, 2d March 1827, 5 S. and D. 515, F. C.

other hand, it has been decided¹, that the insertion of a bill by curators to the debit of their accounts, cannot preclude them or the minor from afterwards pleading prescription against the debt.

It is probable that the oath of a bankrupt debtor in a prescribed bill would be admitted to establish the debt against his creditors. This was allowed in one case², and it seems consistent with the general rules of evidence now established³. In a recent case⁴, the written acknowledgment of the debt in a bill, within the years of prescription, by the administratrix of the original debtor, (though the latter's estate was alleged to be insolvent,) combined with a payment made by her orders, after the years of prescription, of interest due within them, was held to exclude her from the plea of prescription.

It seems to be now established, that, in general, no acknowledgment, whether express or implied, as by markings of interest or partial payments to account of the principal sum, can form a ground of action, when made before expiry of the six years. The creditor, after he has suffered prescription to run, is bound by the statute to *prove* that the debt is still "resting owing." But neither a direct acknowledgment by the debtor, nor the acknowledgment implied in a marking of interest or of a partial payment, when made before expiry of the six years, affords even a presumption that the debt continues "resting owing" after the six years; for, although the whole, or part of the principal sum were due at one period of the six years, it may have been all paid before they expired. An acknowledgment, indeed, granted the very day before they elapse, and with the evident view of establishing the debt, may be probably held, as was once found⁵, to instruct resting owing, as much as if granted after the six years. But, unless in such special circumstances, no acknowledgment during the six years can have this effect, because it does not afford that proof of "resting owing" which the creditor is required to

¹ M'Nicol v. M'Neill, 29th Nov. 1821, 1 S. and B. 175.

² Buchan v. Robertson Barclay, 31st Jan. 1787, Murr. 11129.

³ Tait on Evidence, 277; 1 Bell, 334; 2 ditto, 484.

⁴ M'Tavish v. Lady Salton, 25th Jan. 1825, F. C.

⁵ Lindsays v. Moffats, 19th May 1797, Murr. 11137.

adduce. It has been said¹, that such an acknowledgment, as it proves the subsistence of the debt at its date, ought to form the commencement of a new term from which prescription should run, and that this new period of prescription cannot be less than six years. But this doctrine implies a misconception of the nature of such an acknowledgment. If the acknowledgment forms a distinct obligation, then, as already shewn, it is not affected by the sexennial prescription. But, if it does not, it cannot prove the subsistence of the debt during the six years, because the bill is then the best proof of it, and the currency of the prescription bears reference to it alone. But when, by lapse of the six years, the bill ceases to be "of force, or effectual to produce diligence or action," the only remaining way of "making good the debt" is to prove its subsistence *at that time* by the debtor's writ or oath, and not by his acknowledgment during the six years.

The same principle is applied to the triennial prescription of merchants' accounts, though in a different mode, from the different nature of the subject. The statute establishing that prescription enacts, that all actions for such accounts, "and "other the like debts that are not founded upon written obligations, be pursued within three years, otherwise the creditor shall have no action, except he either prove by writ "or by oath of his party." The exception here stated, though not so express as that of the sexennial act, is understood to mean, that the creditor, after the lapse of three years, must prove the subsistence as well as constitution of the debt². No doubt, it has been held, that a note holograph of the debtor, acknowledging certain furnishings, proved the subsistence of the debt, though granted before expiry of the three years³, or even that a written order for furnishings entitled the pursuer, after the three years, to prove the furnishings by witnesses⁴. But the original debt might, from its nature, have been proved by witnesses without writing; and, when

¹ *Vide* opinions of the majority of the Court in *Lindsays v. Moffats*, 639, note 5. A similar opinion was also expressed by several of the Judges in *Viscount Arbutnot v. Douglas*, 3d March 1795, *Morr.* 11133.

² 1 Bell, 332; *Tait on Evidence*, 457.

³ *Donaldson v. Murray*, 15th Jan. 1766, *Morr.* 11110.

⁴ *Dickson v. Macaulay*, 5th July 1681, *Morr.* 11090.

written evidence intervened, it formed a new and distinct ground of obligation. It was therefore presumable, that the debtor would not settle the claim without taking written evidence of its payment to counteract this his written obligation. In bills or notes, on the contrary, a written acknowledgment granted during the six years, unless it forms a valid obligation by itself, does not change the nature of the claim, since the bill or note, so long as it is effectual, forms the best evidence of the debt. It therefore continues, during the whole six years, to be the primary obligation to which alone the prescription bears reference; and hence no acknowledgment of the debt can prove resting owing in the manner required by the statute, unless granted after the efficacy of the bill or note has ceased, viz. after the six years.

Although the doctrine now stated may be considered as settled, the Court have at different times entertained various opinions regarding it. In the first case¹, they adopted the rule now established, by deciding that a letter to the creditor, written on the date of the bill, and inclosing it, though it acknowledged the debt, did not elide prescription. The same principle was followed in the next case², in which the Court distinguished between written acknowledgments granted before and after the six years, by deciding, *1st*, That markings on a bill, in the debtor's handwriting, of partial payments made during the six years, did not obviate prescription; *2dly*, That a letter implying an acknowledgment of the balance due, and written by the debtor to the creditor during the six years, was ineffectual; but, *3dly*, That the debt was proved by a letter, written by the debtor to the creditor after the six years. In a subsequent case³, some of the Judges appear to have held, that an acknowledgment of the debt, though made during the six years, formed a *terminus* from which a new sexennial prescription ought to commence. But it is said to have been the general opinion of the Court, that no such acknowledgment could interrupt prescription on the bill, unless it formed in itself a distinct obligation. This doctrine has been

¹ *Buchan v. Robertson, Barclay and others*, 31st Jan. 1787, *Morr.* 11128.

² *Russell v. Fairie*, 23d May 1792, *Morr.* 11130.

³ *Viscount Arbuthnot v. Douglas, antea*, 640, note 1.

already explained¹. The case was decided on another ground².

In the next case³ the debtor had acknowledged the debt by a writing dated the day before the lapse of the sexennial prescription. It was therefore very improbable that the debt should have been paid next day ; and, indeed, as the acknowledgment, being an inventory of the deceased creditor's effects, including the bill, which the debtor subscribed, was granted evidently to establish the subsistence of the debt, there was no reason to think that the debtor would have paid it the next day without taking a receipt. Hence this document, though granted within the six years, was unanimously held to prove resting owing. This decision, proceeding on special circumstances, did not interfere with the doctrine, that proof of resting owing, after the six years, remains with the creditor, and that it cannot generally be instructed but by a writing granted after the six years. Seven of the Judges took this view of the matter, resting their judgment on the specialties of the case, and holding that no written acknowledgment granted during the six years could obviate prescription, unless it amounted, as they conceived the acknowledgment in question to do, to complete proof of resting owing. But the majority held, that though *the bill* was cut off by the lapse of six years, the subsistence of the debt after that period must in every case be "determined by the common rules of law ;" that "a clear acknowledgment of resting owing, after the term of payment of the bill, and within the six years, certainly proves the debt to be then due, and, of course, forms a new *terminus*, from which prescription must commence ;" and that, "to give no effect to an acknowledgment of resting owing within the six years, in any case where there is a possibility of the bill being paid before their completion, would be to introduce an indefinite and arbitrary course of prescription unwarranted by the statute, the length of which would depend entirely on the time which was to run between the date of the acknowledgment and the expiration of the six years, and which might be only a year, a month, a week, or

¹ *Antea*, 640.

² *Antea*, 633.

³ *Lindsays v. Moffats*, 19th May 1797, *Morr.* 11140.

“a day, according to circumstances.” It has been already shewn¹, in opposition to one part of this reasoning, that an acknowledgment cannot form the ground of a new course of prescription commencing at its date, but that the prescription has reference solely to the bill or note. To refuse effect, therefore, to a written acknowledgment granted within the six years, is not, as here maintained, to subject the acknowledgment to an arbitrary course of prescription, ending with the six years, and consequently varying in its duration, according as the acknowledgment was granted a long or a short period before the end of the six years; for the prescription does not refer to the acknowledgment, but to the bill. The acknowledgment cannot be pleaded, unless to prove, *notwithstanding* prescription of the bill or note, that the debt is still resting owing. This is the only test for deciding whether it is available or not; and the reason why no effect is given, in general, to any acknowledgments but those granted after the six years, is that the latter do prove resting owing; whereas acknowledgments granted during the six years do not, except in a few peculiar cases such as that now cited.

The notion adopted by the majority of the Court in this case, of a new course of prescription beginning from the date of the acknowledgment, seems to have been borrowed from the doctrine of the English law, that a promise within the six years bars the statute of limitations. But this doctrine is founded on principles peculiar to the law of England.

A similar doctrine with that now mentioned seems to be implied in the opinions expressed in a subsequent case², which, however, as already shewn³, afforded a separate ground for the decision. But the law was at last settled by two cases⁴, as to the effect of markings of payment of interest on bills. In the first of these, it was decided, that markings of interest on a bill, made during the six years, though corroborated by entries of the same payments inserted by the debtor in his books, likewise within the six years, did not prove the subsis-

¹ *Antea*, 640, *et seq.*

² *Campbell v. Campbell and Stewart*, *antea*, 635, note 1.

³ *Ibid.*

⁴ *Horsburgh v. Bethune*, 13th Feb. 1811; *Ferguson v. Bethune*, 7th March 1811, F. C.

tence of the debt. The Lord Ordinary's interlocutor, however, was founded, not on these entries being within the six years, but on the circumstance of their being made more than six years before the commencement of the action. It is not said on which of these grounds the Court adhered to his Lordship's interlocutor. In the second case, it was decided, *1st*, That such markings could have no effect, unless made in the debtor's handwriting; *2dly*, That, though they were, those made within the years of prescription were not effectual; and, *3dly*, That other such markings made after the six years were effectual to prove resting owing. There was in these cases another question, to be afterwards noticed, viz. whether the debt, after its subsistence was proved by such markings, became liable to a new prescription of six years. But the decision may be considered as establishing, that, in general, no written acknowledgment, by the debtor, made during the six years, will prove resting owing after the bill or note is prescribed; as the doctrine here applied to markings of interest is applicable to all other written acknowledgments.

In an action of accounting for rents against a factor, to whom the pursuer had accepted a bill for a separate debt, which was prescribed, it has been decided that the defender might, notwithstanding, either instruct the debt by separate evidence, or prove that he had paid it from the rents. One of the facts here offered to be proved was not resting owing, but that the debt had been paid, and, therefore, it did not fall within the provisions of the 12 Geo. III. c. 72¹.

Supposing that resting owing is proved by a written acknowledgment, it is a question, Whether the debt thereafter runs a new sexennial prescription; or whether its duration is determined by the rules adopted before the sexennial prescription; or, lastly, Whether it is like other personal claims, which are subject to no special prescription? This question was raised by one of the Judges in a case already cited², but there was no occasion to determine it. In another case³, the Lord Ordinary refused effect to certain markings of interest holo-

¹ Thomson v. Balvaird, 18th Dec. 1834, 13 S. D. B. 212.

² Russell v. Fairie, 23d May 1792, Morr. 11130.

³ Horsburgh v. Bethune, 13th Feb. 1811, F. C.

graph of the debtor, as they were made more than six years before the commencement of the action. But it does not appear whether the Court affirmed his Lordship's interlocutor on this ground, or because the markings were also dated before the six years on the bill had elapsed. In another case ¹, however, a decision of the point seems to be implied, since the validity of the debt contained in one of several bills was there held to depend on the question, Whether a marking of interest on it in the debtor's handwriting had been made in 1802, more than six years before the commencement of the action, or in 1803, which was less than six years before that period. The marking was ultimately ascertained to have been made in 1803, and therefore the debt was sustained. But, notwithstanding this decision, (which was given in a case relating to a number of other bills, and involving various other points,) the matter may, perhaps, require reconsideration. There is no question in such a case about the prescription of the bill or note; for, as the six years of its currency are supposed to have elapsed, it is no longer a subsisting document, and it is only the *debt* contained in it which the debtor's acknowledgment is brought to prove. But the sexennial prescription is applied by the statute to the bill or note alone; and there is no enactment in it bearing, that, after the subsistence of the *debt* is proved notwithstanding this prescription, the debt likewise shall undergo a new sexennial prescription. The statute merely points out a mode by which the *debt* may be made effectual, notwithstanding prescription of the bill or note; and, if no sexennial prescription is applicable to it when thus revived, it can only be subject to the long prescription, or to the same discretionary period of presumptive payment to which bills were formerly liable. Perhaps the same grounds which led the Court to adopt the last of these alternatives are applicable to this case. But, in another case ², where a marking of interest on a bill made by one acceptor after the six years, was found to have no effect against a co-acceptor, the Court is said to have held, that, as the debt alone is revived by the debtor's acknowledgment, it does not run a new sexennial pre-

¹ *Ferguson v. Bethune*, 7th March 1811, F. C.

² *M'Indoe v. Frame*, 18th Nov. 1824, 3 S. and D. 293.

scription, but can only be subject to the long prescription. It may be expedient that the debt should incur a sexennial prescription like the bill or note; but this can only afford reason for a new enactment. In one case¹, of a bond of caution, where the cautioner pleaded the septennial limitation established for such obligations by the act 1695, but where he had granted a letter, six years after the date of the bond, acknowledging his liability, the Court decided that prescription must run from the date of the letter, and not from the date of the bond. This decision could only have proceeded on the ground, that the letter was a new security corroborative of the former obligation, and therefore was separately binding on the cautioner, unless cut off by the statute. But such a decision is not applicable to the present question, nor, indeed, can the act 1695 afford an illustration of it; since the act regarding bills must be construed according to its own terms, which establish a distinct claim for the debt, independent of the prescription of the bill or note, and yet do not subject that claim to a separate course of prescription.

As the Scotch statute excludes action or diligence on the bill or note after the six years, and merely allows the creditor to prove the debt by the debtor's writ or oath, it follows, that only the debtor whose writ or oath is obtained can be thereby bound; and, therefore, that neither the writ nor oath of one party to a bill or note can prove the debt against other parties. Accordingly, it was held², that markings of interest made after the six years, on a bill by one of three joint acceptors, and a letter by him admitting that the bill was unpaid, could neither of them prove resting owing against another acceptor. It was also held in that case, that the circumstance of a dividend having been drawn, after the six years, from the bankrupt estate of one of the acceptors, could have no effect against the others. The ranking for such a dividend could not be more available than a decree obtained after the six years against one acceptor, which has no effect against another acceptor. It has been since decided³, that an acknowledgment of resting owing made by one acceptor after the six

¹ Gordon v. Campbell, 19th Jan. 1715, Morr. 11037-8.

² Houston v. Yuill, 31st May 1822, 1 S. 449, F. C., and 4 S. and D. 24.

³ M'Neill and others v. Blair, 31st Jan. 1823, 2 S. 174, F. C.

years cannot bind his co-acceptor ; and ¹ the same decision was given as to a marking of interest made on a bill by one acceptor after the six years, when pleaded against another acceptor, the Court holding the point to be settled by the previous case. A contrary doctrine is held in England ; but no argument can be safely drawn from the English practice under one statute, to elucidate the construction of a different statute.

From the statutory rule already explained, viz. that, by the lapse of six years the bill or note ceases to be a ground of diligence or action, and that there can only be a certain specified proof of the debt contained in it, a question has arisen, Whether a person admitting that he accepted a prescribed bill, but stating, that he had done so for another person's accommodation, without receiving value, is thereupon bound for the debt ? In one case ², of an action by the onerous indorsee of a prescribed bill against the acceptor, the latter having admitted his acceptance, which admission was held equal to his oath, and not stating that the bill was paid, but merely that he had accepted it without value for the drawer's accommodation, the Court, holding that the bill was unpaid, and that the want of value was no defence against an onerous indorsee, decerned for payment. The defender here virtually admitted that the money, though not paid to him, was advanced on the faith of his acceptance, and that thus he became bound for it as money had and received to his use. It was therefore as much his debt as if he had first received the money, and then delivered it to the party accommodated. The same question has been since more deliberately considered in two other cases, in both of which the party sued having deponed to facts which proved, that the amount of the bill had been advanced to the other party on the faith of his obligation, and both parties admitting that they had not paid the debt, the Court, though by the narrowest majority, decided against the defender ³. The principle thus established, of the liability of an accommodation-acceptor on a prescribed bill, when he admits that its

¹ *M'Indoe v. Frame*, 18th Nov. 1824, 3 S. and D. 295.

² *Philp v. Milne*, 15th Jan. 1800, *Morr. App. to Bill*, 13.

³ *M'Neill and others v. Blair*, 21st Jan. 1825, 3 S. and D. 459. and F. C. ; *Laidlaw v. Hamilton*, 31st May 1826, 4 S. and D. 636. The first of these cases, after an appeal had been entered, was compromised.

amount has been advanced on the faith of his obligation, has been since recognised in several other cases ¹. How far, in such a case, the oath of the co-obligants of the party sued, regarding the constitution of the debt, or its not being paid by him, is necessary, or effectual against him, shall be afterwards considered. But, in another case ², where one of two joint obligants in a prescribed promissory-note admitted on oath that he had signed it, but deponed that the holder had stated, at the time, that it would never form a debt against him, he was absolved in respect of his oath.

In one of these cases here referred to ³, the Court remitted to the Lord Ordinary to hear parties on the question how far the defender's obligation, as that of a cautioner, fell under the septennial prescription enacted by the statute 1695, c. 5, as to cautionary obligations. The argument on this point was stopped by an appeal; but the same point has been since discussed before the same Lord Ordinary in another case ⁴ already mentioned, and the prescription has been found inapplicable. A similar decision had been previously given in the case of a party accepting a bill which was addressed to another party as principal, and to him "as security, jointly and severally," and who was found not entitled to plead the septennial prescription against the holder ⁵.

After the six years have elapsed, as there is no longer a claim for the bill or note, but only for *the debt*, it would seem, that the summons ought to conclude for the debt, and that the bill or note should be libelled on only as indicative of the mode in which the debt was constituted ⁶. But there has not been much strictness in enforcing this rule ⁷. In another case ⁸, though the fact of the bill being granted is narrated in the

¹ *Wilson v. Strang*, 3d March 1830, 8 S. D. B. 625, and *Christie v. Hender-son*, 19th June 1833, 11 S. D. B. 744.

² *Baird v. Little's Trustees*, 21st June 1827, 5 S. D. 820.

³ *M'Neill v. Blair*, 647, note 3.

⁴ *M'Indoe v. Frame*, 645, note 2.

⁵ *Sharp v. Hervey*, 24th June 1808, *Morr. App. v. Bill*, 28.

⁶ *Vide* 1 Bell, 394.

⁷ In *Clarkson's Trustees v. Gibson*, 8th June 1820, F. C., the Court sustained action to the effect of having the defender's oath, though the prescribed bill had been specially libelled on.

⁸ *M'Neill v. Blair*, 647, note 3.

summons, it concludes ~~specifically~~, in terms of the statute, for the debt contained in the bill. On the other hand, in a late case ¹, action was sustained, after the years of prescription, under a summons which libelled solely on the bill, it being held that prescription did not annihilate the bill, but merely raised a presumption of payment. In another case ², where the summons concluded for the debt contained in a prescribed bill, the pursuer was not allowed, under it, to found on documents granted within the years of prescription, and alleged to constitute the debt, independently of the bill.

It is a question, Whether, in such an action, it is necessary to adduce the debtor's writ or death, *in all cases*, to prove resting owing, although he should admit it judicially in his pleadings? It would appear that such an admission supersedes other proof. A judicial admission, indeed, though in a written pleading, can scarcely be considered as an acknowledgment by the debtor's writ, since a pleading is not properly his writ, but only the judicial record of his case. But the statute merely enacts that it "*may be lawful*" to prove the subsistence of the debt by his writ or oath, and, therefore, it does not seem to exempt this species of action from the rule applicable to all actions, viz. that the proof referred to is to be led only when necessary, and cannot be required when the defender's admission supersedes it. The defender might, indeed, formerly refuse to make any statement, and plead the statute ³; and, although the statute 6 Geo. IV. c. 120, and the act of Sederunt 1828, following on it, now enact, that, when a statement is made by the pursuer, and not denied by the defender, if within his knowledge, it shall be held as admitted, it may be doubted whether this enactment is not subject to an implied exception, (also founded on statute, and not recalled,) of such claims as, being prescribed, are declared to be provable only by writ or oath of party. But, if the party's statement does amount to an admission, it must have the usual

¹ Christie v. Henderson, 10th June 1833, 11 S. D. B. 744, F. C.

² Stirling v. Lang, 4th March 1830, 8 S. D. B. 638.

³ It has been decided, that a party is not bound to confess or deny, in terms of the act of Sederunt, then subsisting, where his oath is the only mode of proof competent; Dick v. Aytoun and Cassie, 24th Feb. 1738, Morr. 12041.

effect of one. This doctrine does not seem to be doubtful, although there has been some doubt regarding its application. In one case ¹, where the defender merely stated certain particulars regarding the debt in the bill, to which he offered to depone, the Court, without requiring his oath, held that these particulars, though amounting to a discharge of the debt, formed extrinsic qualities, which could not be admitted without proof, and therefore sustained action for the debt. But the parties here agreed to hold the defender's statement as equivalent to his oath, and to argue upon it as such. In a subsequent case ², the Court holding, that the defender's statement was an admission of resting owing, decerned against him without requiring his oath. This case is, therefore, an authority in favour of the doctrine now stated. Again ³, it was held that the defender's oath was necessary, although the pursuer maintained that the statement in his pleadings amounted to an admission of "resting owing." The majority of the Court did not think that this statement amounted to such an admission, although it seems to have been held that, if it had been clearly made, the oath would have been unnecessary ⁴. This case, therefore, is not inconsistent with the general doctrine previously established.

In another case ⁵, where two of three acceptors of a prescribed bill admitted that they had signed the bill, but stated that they had done so as cautioners for the other acceptor, (who made no defence,) the constitution of the debt was found by the Sheriff to be proved, and the pursuer was allowed to prove its subsistence by their oaths, which was held to be done by their statement that they had not paid it. The Court adhered to this judgment, however, on the ground that the constitution of the debt was proved, not by the admissions of the defenders alone, but by markings of interest beyond the years of prescription, in the hand of the third acceptor, for whose

¹ Robertson's Trustees v. Clarkson, 19th Nov. 1784, Morr. 13244.

² Philip v. Milne, 15th Jan. 1800, Morr. App. to Bill, '13. *Vide* also the Lord Justice-Clerk's and Lord Glenlee's remarks on that case in Clarkson's Trustees v. Gibson, 8th June 1820, F. C.

³ Clarkson v. Gibson, note 2.

⁴ *Vide* opinions of Lords Craigie and Glenlee in this case.

⁵ Wilson v. Strang, 3d March 1830, 8 S. D. B. 625.

behoof the bill was said to have been signed, and which instructed both the onerous origin of the debt, and that it was due at the date of the markings.

But, whether the pursuer's claim rests on the defender's admission, or on his oath, one or other must afford complete evidence of resting owing, since the statute throws the whole burden of proving that fact on him. On this ground it may be doubted, whether there was reason for holding, in a previous case ¹, that the defender's statement established the claim; as it merely imported that the defenders had signed the bill as acceptors for the accommodation of another party, and not that it was still unpaid, but without saying any thing on that subject, referred generally to the plea of prescription. In another case already noticed ², the defender admitted on oath that he had not paid the bill. In a previous case ³, where the defender, though he admitted the granting of the bills, (stating, however, that they were granted without value, and were struck at by the bankrupt act, 33 Geo. III. c. 74,) did not admit that they had not been paid, but pleaded prescription, and that the pursuer was bound to prove resting owing by his writ or oath, the Court were not satisfied with a *presumption* of non-payment, but held that the pursuer must prove it; and thereafter found that the defender's oath was necessary. In an earlier case ⁴, where the defender's judicial statement was received, both by the parties and the Court, as equivalent to his oath, the fact of non-payment was implied in his statement. In a later case ⁵, where an action was brought for the balance of a prescribed bill, eleven years after it became due, and the defender, on a reference to his oath, deponed that he had paid this balance to the eldest son, (the mother and younger children being in right to the note,) but without direct proof of authority from them to the son to receive it, though the authority was held to be presumable from their subsequent taciturnity, both as to principal and interest,

¹ Philp v. Milne, 650, note 2.

² M'Neill and others v. Blair, *antea*, 647, note 3.

³ Clarkson v. Gibson's Trustees, 648, note 7.

⁴ Robertson v. Clarkson, *antea*, 650, note 1.

⁵ Robertson and others v. Thomson, 26th May 1830, 8 S. D. B. 810.

contrasted with their previous urgency for payment, the Court decided that resting owing was not proved. The result of these decisions appears to be, that non-payment must be either directly admitted, or proved by writ or oath.

3d, Nature and effect of the oath.—Intrinsic and extrinsic qualities.—Mode of examination.—Holding as confessed.

Another question is, Whether, on reference to the defender's oath, he will be absolved in all cases by any statement which imports either the original nullity or extinction of the claim. Here the same distinction must be observed with regard to intrinsic and extrinsic qualities of oaths as in other cases of reference to oath. The points referred are, 1st, The original validity of the claim; and, 2dly, Whether it is resting owing; and any answer which directly meets these questions, being intrinsic to the subject of the oath, must be admitted as conclusive, without farther evidence. As to the constitution of the claim, it has been held intrinsic to the reference, when the defender, in an action on certain bills, deponed, that, though he accepted them, he did so by mistake, imagining them to be receipts for money advanced to him on account of a son of the drawer¹. This was a direct answer to the question, whether there was ever any debt, as it implied that there was none. The same ground of decision was followed², where a party, being sued for the amount of a prescribed receipt, containing also a promise to pay, and having emitted an oath, which imported that the pursuer's father, to whom this document was granted, had at first refused to take it, as he said that he owed the defender more than its amount, (which statement the defender believed to refer to the value received by him for a bill (produced) previously granted by him to the defender's father,) but that the defender persuaded him to take it in the meantime, till accounts between them were settled, the Court held, though by the narrowest majority, that this statement affected the constitution of the debt contained in the note, and was therefore intrinsic to the reference. The minority

¹ *Agnew v. Macrae*, 20th Feb. 1784, *Morr.* 13219.

² *Fraser v. Fraser*, 27th June 1809, *F. C.*

held, that the previous bill to the defender's father had no connection with the granting of the note, as it was not mentioned at that time, and could not be introduced but as a ground of compensation; in which view, being prescribed, it could not be instructed except by the pursuer's writ or oath. But it does not seem to have been disputed, that, if it had entered into view, as was held by the majority, in granting the note, it must affect the constitution of the debt contained in it. As to the constitution of the debt, there is reason to doubt the soundness of the decision in another case¹, where the acceptor of a prescribed bill having deponed, on reference to his oath, that it was granted for the price of smuggled goods, and that, though he had not paid the whole, yet, from the loss which he had sustained on the goods, he considered himself as owing nothing, the Court held the first of these statements to be an extrinsic quality requiring a separate proof; and therefore decerned for the claim. It would rather appear, that it was intrinsic to the question, whether there was a claim, as it tended directly to establish the nullity of the claim.

As to the subsistence of the debt, it has been held², where the debtor in a bill deponed, that, as the parties discovered, after the bill was granted, that the creditor owed him more than its amount, the latter had agreed to cancel the bill, which was not then in his possession; this was an intrinsic quality of the reference, seeing it "proved the debt not to be owing." In another case³, of an action on a bill, which, however, occurred before the 12 G. III. c. 72, the pursuer having ultimately referred resting owing to the oath of the defender, who deponed, that he had accepted the bill, and had not paid it, but that the creditor in it had received sums from him beyond its amount, and had agreed, on that and other grounds, to give it up to him, the Court found that this oath did not prove resting owing. Both these cases establish, that any answer which directly proves the payment or discharge of the debt, is intrinsic to the question of resting owing.

¹ *M'Neill v. M'Kissock*, 28th Feb. 1804, *Morr. App. v. Oath*, No. 1.

² *Grant v. Grant's Creditors*, June 1793, *Morr.* 13221.

³ *Lady Forrester v. Lord Elphinstone*, 13th Nov. 1742, *Morr.* 13215.

On the other hand, when the defender does not deny that the debt is resting owing, but states that it is balanced by a counter claim, this is a quality extrinsic to the reference; for counter claims do not extinguish the debt *ipso jure*, but merely afford a ground of defence or of separate action, in both of which views they must be proved, and the defender, therefore, cannot obtain the benefit of them, merely by introducing them into an oath respecting the debt in question, with which they have no proper connection. On this ground, in an action on a bill ¹, brought before the 12 Geo. III. c. 72, resting owing being referred to the acceptor's oath, and he having deponed that he had accepted and had not yet paid the bill; but having stated that his debt was compensated by a sum which the original creditor had agreed to give him for board, and by other claims, the Court found, that he could not plead compensation on such claims, except in so far as he had instructed or could instruct them. A similar decision was pronounced in another case ², where a party having, in letters written after the lapse of prescription on a promissory-note, acknowledged the debt, but alleged counter claims, it was decided that these claims were extrinsic, and must be proved *aliunde*.

There is a short notice of two early cases ³, where, in actions on bills, payment having been referred to the pursuer's oath, and he having deponed, that he had got a partial payment, but that it was made to a separate open account, this was held to be extrinsic. The soundness, however, of these decisions may be questioned, since the oath was intrinsic to the payment of the bill, being a statement that it had not been paid. In another case ⁴, where the defender, in a statement admitted as equivalent to his oath, alleged that he had granted a bill for value in a quantity of wine, which had turned out so bad as to be useless,—that the pursuer had told him he need not return it, as nothing was to be charged for it,—

¹ Mitchell v. McIlney, 11th Feb. 1751, Morr. 13241.

² Macdonald v. Crawford, 7th March 1834, 12 S. D. B. 533.

³ Reid v. Binning, 6th Jan. 1670; Cameron v. Danskine, Feb. 1630, 2 Fol. Dict. 295.

⁴ Robertson v. Clarkson, 19th Nov. 1784, Morr. 13244.

and that he had incurred great loss in using means to rectify it, the Court, holding that such a statement resolved into a claim of compensation, found that it could not be established except by a separate action. It related to transactions which took place after the constitution of the debt, and could not affect it when constituted, except by compensation. The same decision was given ¹, where the acceptor of a prescribed bill having deponed, that he had granted it in exchange for another bill, on condition that the terms of a certain lease were punctually performed, and that there was now an arrear of rent under the lease, besides another claim for a business account, the Court, holding that these claims resolved into a plea of compensation, found them intrinsic to the reference. It was pleaded, but without success, that the stipulation as to the lease entered into the constitution of the debt, and, at any rate, the extent to which that could form a ground of deduction from the bill, depended on the amount of the claims under the lease, which the defender was bound to instruct by separate evidence.

In another case ², the defender, in an action on a prescribed bill, having deponed, on reference, that it was extinguished by a bond for a sum of money, which he had granted to the creditor with that view, this statement, being contrary to the terms of the bond, which bore to be granted on a different account, was held to be extrinsic. On another kind of question ³, viz. with regard to the value given for a bill, which was referred by the acceptor to the oath of the holder, his son-in-law, and the latter deponed, that the bill had been given to him, after his marriage to the acceptor's daughter, in conformity with a promise made before the marriage, that he should have £.500 of tocher with her, the Court, holding that the allegation of this promise was extrinsic, and influenced also by the improbability of the statement, from the circumstances of the parties, and by strong presumptions of fraud, suspended a charge on the bill. It was suggested that, if the bill had been dated before the marriage, and had been sworn to have

¹ Rankine v. Adair, 29th June 1799, Morr. 13245.

² Williamson v. Peacock, 11th Dec. 1810, F. C.

³ Halliday v. Halliday, 13th Dec. 1826, 5 S. D. 116.

been given at the time of the alleged promise, and as the tocher, the result might have been different.

It has been decided, that a statement on oath, that the creditor agreed to a composition contract, (the efficacy of the contract depending on the accession of other creditors, which required to be proved by separate evidence,) is extrinsic, and cannot be held as included in the reference by the creditor. But the Court allowed parties to be heard as to the effect of the composition contract ¹. The proof of the accession of the other creditors failed.

The doctrine now stated would apply equally to the defender's judicial statements as to his oath, in any case where it may become a question, whether such statements admit resting owing; those parts of them which affect the constitution or subsistence of the debt being intrinsic to the proper subject of the process, but those which relate to counter-claims being extrinsic. If, however, there should be a doubt whether such statements *admit* resting owing, the pursuer must prove it by the defender's writ or oath.

Although the defender, when reference is made to his oath, is the pursuer's only witness, by whose evidence he must prove that the debt was constituted, and is resting owing, the defender cannot confine himself to a general answer, that the debt never existed, or has been paid, but must, like other witnesses, answer all special interrogatories on these two points, otherwise he will be held as confessed. The same principle is applicable here, which was applied in a reference to an indorsee's oath, regarding the value which he gave for a bill ². But, in a case ³ where reference was made to the representative of a deceased debtor, and he deponed that he never heard of the bill, and did not know whether it was paid or not, the Court dismissed an action for the debt; for the defender could not be held as confessed, as he neither knew nor was bound to know any thing regarding the bill, and, on the other hand, the pursuer had failed in his proof of resting

¹ *Brown v. M'Intyre*, 26th June 1828, 6 S. and D. 1022; 1st June 1830, 8 S. D. B. 847.

² *Swan v. Swan*, 1780, *Morr.* 9418, *antea*, 108.

³ *Stirling v. Henderson*, 11th March 1817, F. C.

owing¹. On the other hand², when a person who was sued for the amount of a prescribed note granted by a company to which he belonged, admitted, on reference to his oath, the constitution of the debt, and stated that *he* had never paid it, —that he did not know of any of his partners having done so,—that none of them had made any claim against him on that account,—and that, though one of them had undertaken to collect the funds, and pay a composition on the debts, he did not know that this was done, the Court, altering the Lord Ordinary's interlocutor, held, by a majority, that the debt was resting owing, reserving, however, to the defender to prove that it had been paid by composition. It appears to have been held, that, as the constitution of the debt was admitted, the defender was bound to have ascertained, and stated positively whether it was paid or not, seeing it was his own proper debt; (the Court being of opinion, that there was no distinction in this respect, whether the debtors owed it as partners of a company, or as individuals); and that, as he had failed to do this, there arose thence a presumption of resting owing against him. This presumption was the stronger, as he did not state, from his own knowledge, that the creditor in the bill had agreed to accept the alleged composition from the company. It has been decided, that, when the creditor in a bill, on a reference by one of the obligants in it as to a payment made by him, depones that it was made on another account, the other obligant cannot, in the face of such an oath, be allowed to prove, by other evidence, that this payment was truly made to account of the bill³. Lastly, in a case⁴ where action was brought by the drawer and holder of a bill, twelve years after it had become due, against two of four acceptors, (one of the other acceptors, for whose accommodation it had been accepted, having died, and the other having become bankrupt, before action was raised on it,) and the two defenders deponed that they accepted it for the deceased acceptor's accommodation, but that they did not know

¹ *Stirling v. Henderson*, 11th March 1817, F. C.

² *Stewart v. Stewart*, 5th Dec. 1823, 2 S. and D. 558, F. C.

³ *Beattie v. Haliburton*, 25th Jan. 1827, 5 S. and D. 236.

⁴ *Christie v. Henderson*, 10th June 1833, 11 S. D. B. 744, F. C. Reference was also made, in this case, to a previous unreported case, *Harvey*, 9th July 1825, as supporting the judgment.

whether money was got for it or not, or whether it had been paid or not, and no other oaths were taken, a majority of the whole Court decided, that resting owing was proved. It appears thus to be held, that, if one of several acceptors admits on oath that he has not paid a bill, and cannot state that any of the other acceptors has paid it, the debt must be considered as resting owing, though one of the parties not sued is the person for whose behoof it was granted, and who may possibly have paid it. Several Judges dissented strongly from this decision.

If a party has been regularly cited to appear in an action for the debt in a bill or note, and a reference is made to his oath, even in absence, (proper notice of the reference being given to him,) it would appear, that, on his failing to appear and depone on the reference, he will be held as confessed, so as to exclude him from afterwards opening up the decree pronounced against him. But such a reference must be made by a regular judicial act, and a summons containing a clause of reference, followed by an ordinary decree in absence, cannot have the effect of a decree *pro confesso* ¹.

Although the creditor should establish resting owing by the debtor's writ or oath, he will not be entitled to use summary diligence, though the protest on the bill or note has been registered within the six months prescribed by statute, and it may be doubted whether such diligence, if raised, could be turned into a libel. But no case appears to have occurred on that question.

¹ *Nicholson v. Macleod*, 23d Nov. 1810, F. C.

SECTION III.

Limits of the Sexennial Prescription.

1. Exception of minority.

It has been already mentioned¹, that, by the 12 Geo. III. § 40, "the years of the minority of the creditors in such notes or bills shall not be computed in the said six years." This enactment, from its terms, was probably meant to apply, not merely to the payees in bills or notes, but to creditors by indorsation, who, indeed, require the exception as much as payees. Such indorsees appear to have this benefit, although the previous holder, himself a major, should indorse the bill or note to a minor the day before the lapse of the six years; for, though the years of prescription would thus be extended during the whole minority, while they would have expired immediately if the bill or note had remained with the payee, this is a consequence of the negotiability of such documents. The efficacy, however, of such an indorsation must depend on the fact of its being made during the six years. If, therefore, it is made afterwards, but dated within that period, or not dated at all, in which case it is presumed to be of the same date with the bill, it will notwithstanding be competent to prove the true date of making it, as it is a fraud against the statute.

Minority cannot be pleaded by parties who have no direct title to the bill, but are merely interested in it as legatees under a trust-deed, when it is granted to one of the trustees personally for part of the trust-funds. In such a case, the trustee, or, on his death, his executor, is entitled to exact payment². This seems to follow, though the bill or note were taken payable to him by the denomination of trustee; for, although his executor would not probably be entitled, in that case, to exact payment, as trusts are not transmissible, and

¹ *Anteu*, 628.

² This was one of the points decided in *M'Neill and others v. Blair*, 31st Jan. 1823, 2 S. and D. 174, F. C.

though the parties interested under the trust might have an equitable right to bring an action for payment, in which action the bill or note might be produced in proof of their interest, yet they are not properly creditors in terms of the statute.

2. Outlawry.

It is no objection to the currency of the sexennial prescription, that the debtor in the bill has, during the whole or a part of it, been under sentence of outlawry¹; for the statute makes no such exception; and, indeed, as outlawry merely affects the rights of the person outlawed, it does not appear to render an action against him incompetent, though it cuts off his right to defend himself against it.

3. Claims not appearing *ex facie* of bills or notes.

The sexennial prescription applies only to claims appearing on the face of bills or notes, and not to separate claims from transactions connected with them. It has therefore been decided², that it does not apply to an acceptor's claim of reimbursement for having paid certain bills accepted by him for the drawer's accommodation, since that is a separate debt arising from the advance of the money, as to which the bill is merely an article of evidence, or to a claim of indemnity by an acceptor against a co-acceptor, for whose accommodation he had subscribed the bill³. The same doctrine seems applicable to the drawer's claim of recourse, when he is not likewise payee, against the acceptor, since he claims, not as a creditor on the bill, but only for indemnity, after he has paid it to the proper creditor. The exception in favour of minors, which provides only for the "minority of the creditors in such bills or notes," seem to prove that the statute had in view only the case of direct creditors.

4. When Scotch prescription is applicable?

The question, whether the Scotch prescription or the English statute of limitations applies to a bill or note, seems to depend on the fact where it is made payable, as it will be presumed that the parties meant the contract to be regulated by

¹ Brodie v. Sheddan, 20th Feb. 1821, F. C.

² Ralston v. Lamont, 23d May 1792, Morr. 1533, 11130. *Vide also* Soutars v. Soutar, 29th June 1827, 5 S. and D. 876, as to the inapplicability of the sexennial prescription to a letter of relief granted by two acceptors of a bill to their co-acceptor.

³ Jolly and Husband v. McNeill, 28th May 1829, 7 S. and D. 666.

the law of the country in which they wished it to be performed. Thus, the English statute being pleaded against an action brought on a bill drawn in Virginia, but payable in Scotland, the Court repelled the plea, and held that the Scotch law was applicable¹. In another case, the converse of this rule was applied, by sustaining a defence on the statute of limitations, against an action on a note which had been granted by the debtor then residing in London, to the creditor, who was also residing there, payable on demand, but on which no demand had been made for six years from its date, though the debtor remained in England during all that period². It was argued, that, as the note was payable on demand, and as both parties lived in England at the time of granting it, they must have intended that it should be paid in England. The English statute had been previously found applicable³ to a note granted in England, and, as is to be presumed, made payable there, though the place of payment is not specified in the report. Indeed, the law of the place of payment seems to regulate the performance of any contract in all respects. For instance, in the case⁴ of a bill drawn by a person abroad on a party residing in Scotland, and payable in Scotland, the Court held, though the bill was not accepted, that it was not a foreign but a Scotch debt, and that therefore the drawer could not suspend diligence raised on it in Scotland, on the ground of his having got a certificate of discharge under a commission of bankruptcy at New York. On the other hand, a merchant in Berwick having granted a bill payable there for part of the price of goods which he had bought in Scotland, and which were deliverable there, the Court decided that the bill was an English debt, and was discharged by an English certificate, though they also held that the certificate did not bar action and diligence for the remainder of the price, which they considered to be a Scotch debt⁵. Again, it was decided⁶, that an English certificate barred proceedings against the drawers of a bill drawn in Scotland but payable in Lon-

¹ Rogers v. Cathcart and Ker, 25th July 1732, Morr. 4507.

² Lord Lovat v. Lord Forbes, 2d Dec. 1742, Morr. 4513.

³ Grove v. Gordon, Nov. 1740, Morr. 4511.

⁴ Armour v. Campbell, 21st Jan. 1792, Morr. 4476.

⁵ Watson v. Renton, 21st Jan. 1792, Morr. 4582.

⁶ Royal Bank v. Scott, Smith, Stein and Co., 20th Jan. 1813, F. C.

don, and which the drawees, also residing in London, had accepted. On the principle of a case previously cited ¹, this must have been the decision, whether the bill had been accepted or not. From a doctrine which was established in the case last cited, viz. that an English commission must receive effect against the bankrupt's moveable estate in Scotland, the certificate must have been effectual, although the bill had been considered as a Scotch debt; and so far, the doctrine held in a previous case, that an *American* certificate of bankruptcy did not discharge a Scotch debt, appears to be overruled. But the Court, besides, held that the debt in the case last cited was an English debt.

On the same principles, in an action ² on a bill accepted in Scotland, but payable in London, and said to have been acquired there by the pursuers, under circumstances which would have excluded them in England from suing on it, this allegation was held to be provable by such evidence as would have been competent in England. In another case, of an action on bills accepted by English bankers, and payable in England, against the payee and indorser, who resided in Scotland, the Court decided that the debt, even as to the indorser, was an English debt, and fell under the English statute of limitations ³.

In some of the cases reported under this head, it has been farther discussed, how far an exception made against the English statute of limitations, by 4th Anne, c. 16, § 19, in case the debtor should be *beyond seas*, during the six years, or any part of them, applies when he was resident in Scotland, during that period. In one case ⁴, the exception is said to have been held inapplicable, partly "because the defender " was in England when the cause of action accrued, and also "because the statute of limitation is only suspended while the " debtor is 'beyond seas,' which are the words of the statute." This construction of the statute of Anne, which appears to be well founded, was, however, departed from subsequently ⁵,

¹ *Armour v. Campbell*, 661, note 4.

² *Glyn and Co. v. Johnston and Co.*, 8th June 1830, 8 S. and D. 889.

³ *Rickman and Parry v. M'Lauchlan*, 24th May 1827, 5 S. and D. 700, F. C.

⁴ *Grove v. Gordon*, 1st Nov. 1740, *Morr.* 4510.

⁵ *Renton's Trustees v. Baillie*, 7th July 1755, *Morr.* 4516.

in an action on a promissory-note granted and payable in London by a Scotch factor to his English constituent, for the balance of rents received in Scotland, as ascertained by an account which had been fitted between the parties in London. As the debt was here undoubtedly English, the competency of pleading the statute of limitations against it was not questioned. But, as the debtor had resided in Scotland during the years of limitation, the Court held that the pursuer was entitled to plead the exception now mentioned, as if the debtor had been "beyond seas," which was interpreted to mean beyond the jurisdiction of the English Courts. This construction, which is not said to have been warranted by any English authorities, appears to be extremely doubtful. In a subsequent case¹, where the Irish statute of limitations was pleaded against an action on a promissory-note granted in Ireland and payable there, an exception in that statute, (copied from the English statute of 4 Anne,) of the case where the debtor is "beyond seas," was held to apply, as the debtor had resided chiefly in Scotland from the time when the note was granted. But this case fell within the words of the exception, as the debtor's residence had been "*beyond seas*," with reference to Ireland.

¹ M'Neill v. M'Neill, 2d March 1761, Morr. 4517.



CHAPTER IX.

OF BILLS AND NOTES AS AFFECTED BY INSOLVENCY OR
BANKRUPTCY.

WE have hitherto discussed the constitution, transmission and enforcement of bills or notes, on the supposition that all parties concerned in them are solvent. It is now to be considered what effect the insolvency or bankruptcy of the parties by or in whose favour a bill or note is granted, by or to whom it is transferred, or by or against whom payment is to be enforced, has on the rights connected with it.

In discussing this subject, it is necessary to distinguish between the nature and effects of insolvency and bankruptcy.

Insolvency, or the mere inability of a person to pay his debts, whatever obligations it may create between the debtor and his creditors, does not alter his relation to third parties ignorant of it, or invalidate their dealings with him. But if it has become notorious, he is then said to be bankrupt. The first statutory definition of bankruptcy in Scotland was given by the act 1696, c. 5; and that definition, as amended by the last bankrupt statute¹, forms now the legal description of bankruptcy. According to the first of these acts, "if any debtor under diligence by horning and caption at the instance of his creditor, be either imprisoned, or retire to the Abbey, or any other privileged place, or flee or abscond for his personal security, or defend his person by force, and be afterwards found, by sentence of the Lords of Session, to be insolvent," he shall be considered as notour bankrupt, on the ground of diligence by horning and caption and insolvency taken together, coupled either with imprisonment, "or

¹ 54 Geo. III. c. 137, § 1.

“retiring, or flying, or absconding, or forcible defending,” and that from the date either of his imprisonment or retiring, &c. The last bankrupt statute ¹, in order to provide for those cases in which the debtor is out of Scotland, or is not liable to imprisonment, “by being in the sanctuary, or by reason of “privilege or personal protection,” enacts, that, in all these cases, “a charge of horning executed against him, together “with either an execution of arrestment of any of his effects, “not loosed or discharged within fifteen days after the date “thereof, or an execution of poinding of any of his move- “ables, or a decree of adjudication of any part of his heritable “estate, for payment or security of debt, shall, when joined “with insolvency, be held a sufficient proof of legal bank- “ruptcy,” equivalent to the bankruptcy defined in the act 1696, from the time when the charge of horning, combined with one or other of the several kinds of diligence above mentioned, shall be executed. This statute farther enacts, that every person, whether residing in Scotland or not, whose estate shall have been sequestrated under the authority of that or former statutes, shall be accounted a notour bankrupt from the date of the first deliverance of the Court on the petition for his sequestration. Although proof of insolvency is legally required in most of these cases, it is seldom necessary in fact, as the other requisites often afford in themselves a proof of insolvency ².

Notwithstanding bankruptcy, the bankrupt remains vested with the right both to his personal and heritable estate, is entitled to enforce all obligations previously contracted in his favour, and is *in titulo* to all bills or notes granted, drawn or indorsed to him. With reference to this subject, supposing that a person who has bought goods from another draws a bill, or indorses a bill or note to him for the price, on the faith of receiving the goods, and the seller becomes bankrupt before delivery, a question has been raised ³, how far he can recall his drafts or indorsements? This question also occurs, when a banker gives drafts or indorsements at short dates, in exchange for bills at long dates, and attempts to recall them, in consequence of the acceptors of the long-dated bills, and the

¹ 54 Geo. III. c. 137, § 1.

² 2 Bell, 168.

³ Glen, 337, 2d edit.

payees of his drafts or indorsements who gave him these bills failing before they become due? In both these cases, the drafts or indorsements are irrevocable, when in the hands of an onerous indorsee, since he is not liable to exceptions pleadable against his author, and, though they have not been accepted, he has a right to present them for acceptance at any time before the term of payment, besides having recourse, on non-acceptance or non-payment, against the drawer and indorsers. The question can only occur when the drafts or indorsements are in the hands of the original receiver at his bankruptcy. Even in that case, if the bill has been accepted, or presented for acceptance before his bankruptcy, it cannot be recalled, because, on acceptance or presentment, it operates a complete assignment to the holder of the drawer or indorser's funds in the drawee's hands. The distinction between actual and constructive delivery is here inapplicable, as it relates exclusively to goods. The only question is, Whether the draft or indorsement can be countermanded by notice to the drawee not to pay, or by withdrawing the funds from him, when it has not been presented or notified to the drawee before the receiver's bankruptcy? In England, such a case¹ occurred with a foreigner, who, having stock in the British funds, employed agents in London to sell it for him, and remit to him bills on Holland for the proceeds. The agents got bills in his favour from a London house, on the faith that this house would be indemnified from the sale, having given the bills before getting the money, agreeably to a practice regarding foreign bills, viz. that they are remitted on one post-day, and the money not given for them till next post-day. Before next post-day the agents failed, so that the drawers never procured money for the bills; and the latter having, in consequence, sent to the drawees in Holland to countermand payment, the holders of the bills brought an action of recourse against them. But Lord Loughborough, C. J., held at *Nisi Prius*, that, though an onerous indorsee would have had a good action, they could have none, because they were liable to the same exceptions as their agents who had got the bills; and the right of the agents was held to be

¹ *De Bras v. Forbes and Gregory*, 1 Esp. 112.

conditional of their paying the stipulated price for them. Such a condition could not be proved in Scotland against a bill-holder but by his writ or oath, or judicial admission. But supposing it to be thus proved, the drawer and indorser of the bills seems entitled to countermand payment of them by the drawee, if not previously presented, or to withdraw his funds from the drawee. Till presentment, the funds are his, so that his creditor arresting them in the drawee's hands before presentment of the bill, would be preferred to the holder, and hence he may detain them by a new mandate to the drawee, contrary to that which he has given by drawing the bill. This mandate, indeed, would not be effectual against an onerous indorsee, although the latter had not presented the bill; because the drawer, by putting an indorsable document into his debtor's hands, enables him to give an indorsee the power of completing his right at any time by presentment, and is excluded from giving a contrary mandate. But the surrender of his right to the original receiver of the bill was merely conditional; and, on the condition not being fulfilled, his power over the funds, as to this party, revives. If he withdraw the funds from the drawee before the bill is presented by the receiver, the latter has only a personal claim of recourse against him, which, in the case now supposed, would be met by personal exception. In such a case, even an onerous indorsee could have no vested right in the funds, since they are gone before his right could attach. But he would have a claim of recourse against the drawer, exclusive of the personal exception against his author.

With regard to the transference of notes and cash to a party who becomes bankrupt, it has been decided, in a recent class of cases¹, that, when parties transmitted cash and notes to a banker's establishment in Edinburgh, for the purpose of being remitted to London, and applied to their use there, but the banker had previously stopt payment in London, and notice of the stoppage arrived in Edinburgh a few hours afterwards, the parties were entitled to recall their cash and notes, as the banker was unable to carry into effect the purpose of

¹ *Cunninghame and others ex parte*, in *R. Maberly*, 3 D. and Ch. 56-86; affirmed by the Lord Chancellor, 3 D. and Ch. 87.

remitting them, and his assignees having, as was held, taken possession of them, and given effect to a claim of lien set up by his agent over them, were found liable in restitution of their amount. In another case arising out of the same bankruptcy, where this banker's agent in Scotland had received notes of another bank, under an agreement to exchange them weekly for his notes in their possession, and the assignees had also intromitted with them, in the same manner as with the notes and cash already mentioned, it was decided, *1st*, That the other bank was entitled to insist on the exchange, notwithstanding the intervening insolvency; and, *2dly*, That the assignees, having intromitted with the notes, were bound to make good their value ¹. A claim similar to that referred to in the first case was rejected, when it appeared that the notes sent by the party claiming, though remitted in a parcel to the insolvent banker's agent, had never been received by him, or entered in the books, but were stolen by a clerk of his the day after the parcel arrived ².

When the right to a bill or note has been once fully vested in a party, bankruptcy does not divest him. If he is not in trade, his moveable effects can only be attached by poinding, or the debts due to him by arrestment in his debtor's hands. It has been already shewn ³, that bills or notes cannot be attached, unless by arrestment in the hands of the acceptor or granter as the proper debtor, or by arrestment in the hands of any other parties to the bill or note after it has been dishonoured, and the dishonour duly notified to them, in which case they become the debtors, accompanied in both cases with a process of exhibition against the person to whom the bill or note is due, that he may produce it, and an application to the Court to sequester it, in order to prevent him from indorsing it. It will thus remain secure, till the arrester obtains a decree of forthcoming on his arrestment, which will entitle him to exact payment from the arrestees. Such arrestment, however, in case of the person for whose debt it was used becoming bankrupt, falls under the 54 Geo. III. c. 137, § 2, which enacts, that, in such a case, all arrestments used

¹ National Bank of Scotland *ex parte*, 4 D. and Ch. 42.

² Watson *ex parte*, 4 D. and Ch. 45.

³ *Antea*, 290, *et seq.*

either on a liquid document of debt, or on a depending action or libelled summons, provided the action be followed out without delay, within sixty days before, or four months after the debtor has been thus made bankrupt, shall be preferred equally; and that, though any one arrester has got decree of forthcoming and recovered payment, he shall be obliged to communicate his preference, under deduction of his expenses. Arrestments used more than four months after bankruptcy are not allowed to compete with those used within the four months, but are ranked *inter se*, agreeably to the former law, according to their respective dates of execution. The same rule is also laid down by this act as to poidings.

With regard to persons engaged in trade or manufactures, as described in the bankrupt act ¹, it authorises a sequestration, whereby the whole estate of the debtor, personal or heritable, (and, in the case of a company, the whole estate belonging to the company or the individual partners,) is placed, from the date of the first deliverance on the petition for sequestration, under judicial control, until the appointment of a trustee, when such estate is vested in him, in the manner detailed in the act ², for behoof of the creditors at large, and is declared to have been so vested in him from the date of the first deliverance ³.

These distinctions, as to the several effects of insolvency, bankruptcy, and sequestration, must be kept in view, in considering the consequences that arise from each, especially with regard to bills or notes, whether belonging to or due by the bankrupt. In discussing this subject, we shall consider,

1st, The power which a person retains over his property, notwithstanding insolvency, bankruptcy or sequestration, more particularly with reference to bills or notes.

It is here assumed that there is no question regarding the bankrupt's title to the bills or notes in his possession. But there may be such questions in the case of a banker or other agent receiving bills or notes from his constituent. It will therefore be necessary to consider,

2dly, In what cases such bills or notes are to be regarded

¹ 54 Geo. III. c. 137, § 15.

² 54 Geo. III. c. 137, § 15, 16, 17, 22, 29.

³ Ibid § 30.

as his property, and when that of his constituent; and what power he or his creditors have over them in the latter case. His power in the first of these cases is included under the preceding head.

After insolvency, bankruptcy, and sequestration have been thus considered, as to their effect on the bankrupt's power over his own bills or notes, or those in his possession, it will remain to discuss,

3dly, The effect of these several events on the claims arising against his estate from bills or notes.

SECTION I.

Bankrupt's Power over his Property, and especially over Bills and Notes.

1. Payment of bills or notes made by or to a bankrupt.

If the party is merely insolvent, such payments are in general valid; as he has still the administration of his estate, and can alone receive and discharge debts due to him, or pay those due by him. It has indeed been determined, that a person, who knew his affairs to be desperate, and had resolved on a declaration of bankruptcy, was guilty of fraud when he purchased goods from third parties, as he knew that he could not pay for them, and that, therefore, his creditors, coming in his place, must restore them to the seller¹. This, however, was decided, not on the mere ground of insolvency, but on the ground of *fraus dans causam contractui*. Insolvency, unless plainly irretrievable, does not preclude a person from entering into new contracts; and even irretrievable insolvency does not take away his power to make or receive payments. So long as he is vested with his estate, he alone can receive payments. Payments by him are also valid, if the term of payment has come, although the creditor should urge him for payment on account of his insolvency; for he has full power to make payment, and the creditor, in enforcing it, is only securing his own rights. It will be accounted a payment if he gives his bill at a discountable date, and afterwards retires it, since that is a usual mode of making payment. But a payment is challengeable on the ground of fraud, when made before the debt falls due²; at least slight additional circumstances will be sufficient to shew, that the creditor knew of the insolvency, and took this unfair advantage of the other creditors. He could not legally demand any thing, before the term of payment, but security; and such security, whether granted voluntarily, or obtained by legal diligence, would, in most cases,

¹ Vide 1 Bell, 245-7, and cases therein cited.

² 2 Bell, 245.

in the event of the debtor's bankruptcy, become reducible. A premature payment will, therefore, be often regarded merely as a scheme to evade reduction.

Even if a person, after being bankrupt, continues in the administration of his estate, payments to or by him, made after the term of payment, are valid. The suspicion of fraud is, no doubt, increased, but the legal grounds for presuming it are not different from those which have been mentioned with reference to insolvency. The case of payment by means of bills, by a bankrupt, shall be afterwards considered.

In the case of sequestration, which, as already mentioned, vests the debtor's whole estate in the trustee, as from the date of the first deliverance, it is enacted¹, 1st, That "all payments made by the debtor to any of his creditors after the date aforesaid shall be void and ineffectual to the receivers in the event of a sequestration taking place, and the trustee shall be entitled to recover the money so paid as part of the bankrupt's estate;" and that "all transactions of the bankrupt subsequent to the said date, from which any prejudice may arise to the creditors, shall be null and void." But, 2dly, It is provided, that this enactment shall not oblige "the debtor of a bankrupt, who has paid his debt to him, *bona fide*, before he knew of the bankruptcy, to pay it a second time to the trustee." A debtor, whether by bill or otherwise, who makes payment after the first deliverance in the sequestration, while aware of the bankruptcy, must pay a second time to the trustee.

The next question is, How far a person insolvent or bankrupt can effectually grant or transfer a bill or note? When he is sequestrated, the right to his estate generally, and to bills or notes payable to him, becomes vested in the trustee, and, therefore, he can have no right of transference. But there are also certain restrictions on the right of transference, through insolvency or bankruptcy.

1. Mere insolvency does not restrict at common law a person's power of conveying any part of his estate, or consequently of transferring bills or notes belonging to him, whether by

¹ 54 G. III. c. 137, § 38.

indorsing them or delivering them blank indorsed, or his power of granting such documents, so as to found a claim against his estate, or of giving drafts on persons possessed of his funds, which operate ¹ as assignments of these funds. No doubt, if the receiver of such bills, notes or drafts, took them in furtherance of a plan between him and the debtor to defraud his creditors, his right would be reducible on the ground of fraud, even at common law. On this ground, probably, in one case ², the arrester of funds belonging to a bankrupt was preferred to an indorsee apparently onerous, as there were pregnant presumptions that he knew of the bankruptcy when he took the indorsement, and was *particeps fraudis* with the bankrupt. Various circumstances will be received as indicative of fraud, without direct proof. For instance, the mere fact of the debtor's insolvency, with the want of a valuable consideration from the payee or indorsee of a bill or note, will set aside that party's right ³. The circumstance of his thus acquiring a right from an insolvent person without consideration, creates a reasonable presumption of fraud against him; and it is better that this should operate against him, as he cannot suffer loss, than that direct injury should be inflicted on the creditors ⁴. The proof of insolvency and want of consideration will, in general, be thrown, in such a case, on the party reducer. Want of consideration, as an element in the presumption of fraud against the receiver of the bill or note, may, if the latter knew of the granter's insolvency, be instructed by parole evidence, even against the presumption of value arising *ex facie* of the document. The question here is not with the common debtor, but it is alleged, that the debtor and the receiver of the document have combined to defraud *the creditors at large*, who were no parties to the transaction, and therefore there is no bar against their investigating the case

¹ *Antea*, 174, *et seq.*

² *Charant v. M'Kay's Creditors*, 22d July 1733, Elchies, v. Bill.

³ 2 Bell, 182 and 204, 4th edition.

⁴ *Kilgour v. Thomson*, 16th Feb. 1628, Morr. 910. In this case a gratuitous disposition to a stranger, granted without an onerous cause, by a person not hitherto proved to be insolvent, and against whom no diligence had been then used, though he became bankrupt soon afterwards, was set aside in an action by a prior creditor of the granter.

in the manner usual with regard to all *pacta illicita* ¹, viz. by a proof at large. The insertion of an onerous cause in the deed is only a part of the fraud, which such investigation must be employed to defeat. There are also other circumstances admitted as indicative of fraud, which need not be here detailed ².

Though the right acquired should be fraudulent, yet, being complete in itself, it will remain good till it is reduced; and, as the fraud which authorises the reduction is personal to the receiver, it will form no objection against the right of a *bona fide* onerous indorsee. Onerosity and *bona fides* will be presumed, unless the contrary appears *ex facie* of the bill or note, or is proved by the holder's writ or oath ³; for, though it should be alleged that he knew of the fraud between the insolvent and his author, he is not thereby accessary to it, (unless the transference to him was *pars ejusdem negotii* with the original transference,) since the fraud is held to have been completed by the transference of the bill or note to the original receiver. An indorsee, therefore, deriving right from the original receiver, must be entitled to the ordinary privileges of an indorsee.

We have already noticed ⁴ one species of fraudulent transaction between a bankrupt and his creditors, which is ineffectual, both at common law and by statute, viz. the granting of bills or notes by the former to any of the latter, to induce them to agree to a composition or concur in his discharge. In a case of this kind which has been cited ⁵, the bills challenged being still in possession of the creditor who had unlawfully obtained them, it was found competent for the granters, without a reduction, to bring a process before an inferior court, concluding that the creditor should either deliver them up or pay their value; and this action was sustained, not merely to the effect of having the bills sequestrated *in manibus curiæ*, till their validity was determined, so as to prevent their indorsement to a third party, but as a petitory action for their final delivery to the creditor, or the payment of

¹ *Antea*, 111.

² *Vide* 2 Bell, 242, *et seq.*

³ *Antea*, 96; *Craig v. Shiells and Co.*, 15th Dec. 1809, F. C.

⁴ *Antea*, 148.

⁵ *Riddel v. Christie*, 20th Nov. 1821, 1 S. and D. 151.

their amount. The action must have proceeded on the assumption that, in the creditor's hands, they were null without reduction.

- II. Act 1621, c. 18.

Independently of the proof of fraud which is necessary at common law to invalidate a bill or note granted or indorsed by an insolvent person, while in the hands of a party accessory to the fraud, there is also a presumptive fraud established, by the act 1621, c. 18.

This act was passed, *1st*, That, in case of a debtor's insolvency, deeds granted by him, without value, to his relations or confidants, in prejudice of prior creditors, might be set aside; and, *2dly*, That, in the same case, certain deeds granted by him *in fraudem* of the prior diligence of creditors might be challengeable.

1. On the first point, the statute, (which is in the form of an Act of Sederunt of the Court of Session, ratified by the Legislature,) enacts, "That, in all actions and causes depending, or to be intended by any true creditor for recovery of his just debt, or satisfaction of his lawful action and right, they," (*viz.* the Court of Session,) "will decreee and decerne all alienations, dispositions, assignations and translations whatsoever, made by the debtor, of any of his lands, teinds, reversions, actions, *debts or goods whatsoever*, to any conjunct or confident person, without true, just and necessary cause, and without a just price really paid, the same being done after the contracting of lawful debts from true creditors, to have been from the beginning, and to be in all times coming, null and of none avail, force nor effect, at the instance of the true and just creditor, by way of action, exception or reply, without farther declarator." There is another clause as to third parties deriving right from the conjunct and confident persons holding immediately of the bankrupt, which shall be noticed afterwards.

This statute, as well as every other matter connected with bankruptcy, has been fully discussed by a learned author¹. But, as the construction given to the statute often differs from its literal meaning, it is necessary to give a summary of the leading doctrines which have been settled regarding it.

¹ 2 Bell, 183-204.

1. None but creditors can challenge the deeds provided against by the statute. But parties holding gratuitous obligations from the insolvent may do so, being in fact creditors. Thus, it has been decided¹, that one gratuitous assignation afforded good ground for challenging another posterior to it in date, though first intimated, on the ground that the first created a debt against the granter, under a clause of war-randice. So, the indorsement of a bill or note as a donation, would entitle the holder to challenge any subsequent deed of the indorser which fell under the statute.

2. The statute does not confine the right of challenge to those who have been creditors before the date of the deed challenged, but seems to extend it to all creditors. Accordingly, this is the latest construction given to it², although a distinction to be afterwards noticed, has been taken between prior and posterior creditors, regarding the proof of insolvency.

The date of the challenging creditor's debt is determined by the date of the contract constituting it, not by the date of the deed or decree of constitution; and, accordingly, if the contract was prior to the deed challenged, it will be accounted a prior debt, though the deed constituting it is posterior³. If the deed challenged be a bill or note, it will probably be presumed to have been delivered on the date which it bears⁴. A draft by the debtor, though not effectual as an assignment of his funds in the drawee's hands till it is intimated to him, will be considered, with reference to the drawer, as completed on its date. In a question as to the date of an acceptance or indorsation, when they have no separate dates, they will probably, (under the limitations already explained⁵), be presumed to be of the date of the bill or note. But it may be proved by extraneous evidence, that this is not their true date.

3. The creditor must prove that the grantee of the deed challenged is conjunct or confident with the granter. In de-

¹ Alexander v. Luddie, 19th July 1675, Morr. 940.

² 2 Bell, 184 and 196, who lays it down, that the benefit of the challenge, when successful, is extended to the whole body of creditors.

³ Pollock v. Pollock's Creditors, 21st Jan. 1669, Morr. 1002; Street v. Mason, 27th July 1669, Morr. 1003.

⁴ Anica, 167.

⁵ Anica, 67, et seq.

ciding who is a conjunct person, the Court has adopted the statutory rule as to the degree of relationship which disqualifies a person from judging in the cause of another; and so, it has been held that brothers ¹, uncles ², sons-in-law ³, stepsons ⁴, and sisters or brothers-in-law ⁵, are conjunct persons in terms of the statute. But, it has been found that an uncle-in-law ⁶, the husband of a wife's sister ⁷, and a cousin ⁸, are not conjunct persons. Confident persons are those whose connection with the granter establishes confidential habits between them, such as servants, factors, confidential men of business ⁹. It is impossible to define all the circumstances which may constitute a confident person. It has been decided that a party who had acted as tutor, curator or trustee for his brother's illegitimate son, is conjunct and confident with him ¹⁰.

4. If it be proved that the deed under challenge has been granted to a conjunct or confident person, the grantee must establish that it was given, in terms of the statute, for just, true, or necessary causes, or for a price truly paid ¹¹. What such considerations may consist of, such as value instantly given, prior obligations, cautionary engagements, marriage-contracts, antenuptial or postnuptial, has been fully explained by the learned author already referred to ¹². The receiver of the deed must prove that it was granted for some such consideration, otherwise it is null. One clause, indeed, of the statute points it out as sufficient, if the deed is established by the writ or oath of the receiver to have been granted without "any true, just and necessary cause, or without any true and

¹ *Finlaw v. Park*, 15th June 1621, *Morr.* 895.

² *Tampersie's Creditors v. Kinfawns*, 18th Dec. 1673, *Morr.* 900.

³ *Skene v. Betson*, 17th Jan. 1632, *Morr.* 896; *Gibb v. Livingston*, 25th July 1766, *Morr.* 909.

⁴ *Mercer v. Dalgarno*, 19th Dec. 1694, *Morr.* 12563.

⁵ *Hume v. Smith*, 5th July 1673, *Morr.* 899, and *Scot v. Ker*, 18th June 1712, *Morr.* 12569.

⁶ *Lord Elibank v. Adamson and Callender*, 8th Feb. 1712, *Morr.* 12569.

⁷ *M'Gowan v. M'Kellar*, 24th Feb. 1826, 4 S. and D. 498.

⁸ *M'Dowal v. Fullarton*, 8th June 1714, *Morr.* 12569.

⁹ 2 Bell, 187.

¹⁰ *Laing v. Cheyne*, 18th Jan. 1832, 10 S. D. B. 200.

¹¹ *Vide Lord Kilkerran's Statement of the Opinions of the Court*, in *Lord Advocate v. Grant*, 9th Nov. 1748, *Morr.* 55, and 2 Bell, 186 and 191.

¹² 2 Bell, 187-90.

“competent price.” But this is not the only proof of fraud; the previous clause of the statute imports that fraud shall be presumed, unless there are onerous causes, which are not to be taken for granted till they are proved. This, accordingly, is the construction given to the statute. It has been questioned, whether the narrative of the deed, that it was granted for value, is sufficient. But it has been settled, that it is not, in deeds granted to conjunct or confident persons¹. It was indeed, at one time, held, as to bonds or assignations bearing to be for specific sums of borrowed money², especially when supported by a fitted account between the receiver and common debtor³, or as to a disposition bearing to be granted for sums of money⁴, that such deeds proved their onerous cause, unless redargued by the granter’s or acquirer’s oath, or unless there were other suspicious circumstances on the face of the transaction, in which case separate evidence of onerosity was required⁵. But this doctrine is contrary to a decision⁶, whereby a narrative in a deed by a husband in his wife’s favour, that she had advanced a certain sum on his account, was found not sufficient, unless supported by separate evidence. Indeed, there does not seem to be any solid distinction between a specific statement of value in a bond or assignation, and a general statement of value in any other deed. The mere statement, therefore, of value in the deed under challenge, whether specifically made or implied, as in the case of a bill or note,

¹ *Vide* the cases of the Duke of Buccleugh *v.* his Grandfather’s Creditors, 8th July 1757, *Morr.* 12575; *M’Neil v. Livingston*, 14th Feb. 1758, *Morr.* 4316, and a number of earlier cases cited by Mr Bell, ii. 191, note 5, of conveyances to conjunct persons. In one of them, *Campbell v. Campbell*, 28th Nov. 1673, *Morr.* 12559, it was held, that a bond by a bankrupt to his brother, bearing to be for money borrowed, could not be disproved but by the bankrupt’s oath. But this decision seems contrary to the other decisions; and, besides, these, at all events, import, that a general statement of value in the deed is not sufficient proof of it. Still less, then, can such a proof be afforded by the general presumption of value incident to bills and notes, or even by the words “value received,” for which they commonly bear to be granted.

² *Hop-Pringle v. Ker*, 22d Jan. 1630, *Morr.* 12553; *Nisbet v. Williamson* and others, 6th Dec. 1638, *Morr.* 2774.

³ *Gray v. Chiesly*, 4th July 1711, *Morr.* 12568.

⁴ *Skene v. Betson*, 17th Jan. 1632, *Morr.* 12554.

⁵ *Glen v. Binnie*, 24th Nov. 1626; *Auld v. Smith*, 29th Jan. 1629, *Morr.* 12550.

⁶ *M’Neil v. Livingston*, note 1.

does not seem in any case to be sufficient. In the case of a bill *inter conjunctos*, produced as a ground of debt, this has been decided¹, and it has been laid down², that, when the deed challenged is a bond, bill, or other voucher of debt, the proof of value must be such as would be sufficient in a constitution of the debt.

5. Deeds are challengeable only if the granter is insolvent; and, in that case, it will generally be presumed that he was insolvent at the date of the deed. This is presumed whenever the challenging creditor's debt was prior to the deed³, and the presumption is obviated only by proving the granter's solvency at the date of it⁴. It has been questioned whether a challenging creditor, whose debt was not contracted till after the date of the deed, is not bound to *prove* insolvency⁵. But the act seems to require only proof that the granter had debts at the date of it⁶, and, when this is established, the proof of his solvency at the date of the deed appears to rest, in all cases, with the defender. A summons for reducing the indorsement of bills under the act, which omitted to state that the granter of the deed was bankrupt or insolvent at its date, was dismissed as irrelevant⁷.

Unless the granter of the deed establishes its onerosity, or the granter's solvency at its date, it will be reducible by any of his creditors. But, if they delay the challenge for a long time, it has been settled, *1st*, That the grantee is no longer bound to prove the granter's solvency at the date of the deed⁸; *2dly*, That he is not bound to prove onerosity⁹; and, *3dly*,

¹ In Belch's bankruptcy, 24th Nov. 1808, cited by Mr Bell, ii. 189, note 6.

² 2 Bell, 192.

³ This is implied in *Mousewell's Creditors v. The Earl of Queensberry*, Jan. 1677, Morr. 961; and expressly decided in *Cult's Creditors v. his Younger Children*, 5th August 1783, Morr. 974.

⁴ This proof was required in the case of *Mousewell*, note 3, and in *Clerk v. Stewart and Watson*, 30th June 1675, Morr. 917.

⁵ 2 Bell, 193.

⁶ *Vide* clause quoted *antea*, 676, and 2 Bell, 184.

⁷ *Wood v. Dalrymple*, 4th Dec. 1823, 2 S. and D. 555.

⁸ *Spence v. Dick's Creditors*, 2d Dec. 1692, Morr. 1014. In this case the challenge was made after a lapse of forty years, but the prescription was held to have been interrupted. The question was with a singular successor; but it was decided on the supposition of his being privy to the nature of the original right.

⁹ *Blackwood v. Hamilton's Creditors*, 18th Jan. 1749, Morr. 904; *Elliot v.*

That, in deciding the question of solvency after a lapse of time, the calculations are not to be made strictly, but must proceed on grounds rather favourable for the debtor¹. The interval of time sufficient for this purpose does not appear to be ascertained. In several cases cited, the shortest period was forty years, though the question was not decided in them on the ground of prescription.

6. Payment of debts to conjunct or confident persons do not fall under the act, though the money was raised by discounting bills, if there is no evidence that the creditor was concerned in the discounting. Thus, where a person in desperate circumstances discounted bills, and paid a debt to his sister with the proceeds, the payment was held good, though the debtor was made bankrupt within sixty days thereafter². This last circumstance gave rise to an argument under the act 1696, to be afterwards noticed.

7. The act provides that the challenge may be made by way of action, "exception or reply, without any farther declaration." It is said, however³, that practice decidedly tends to establish that the challenge can only be made by way of action, although it is laid down⁴, that, when it relates to bills indorsed, or moveables conveyed away, the action may be brought simply for restitution, or by way of declaring that the effects conveyed away belong to the debtor's estate. A reduction, however, is preferable. As the statute is in the form of an Act of Sederunt of the Court of Session, made to regulate *their own* judgments, and simply ratified by Parliament, an action under it is not competent unless before the Court of Session.

The right of challenge applies to all bills or notes subscribed by the debtor, whether as acceptor, to rear up a claim against his creditors, or as drawer on a person possessed of his funds, to convey these funds to the payee, or as indorser, so as to convey away the right to a bill or note which might otherwise be available to his creditors. It even applies to the

Elliot, 10th Nov. 1749, Morr. 905. In this last case the question occurred with a singular successor; but it appears to have been decided on the same grounds as if it had occurred with the original disponent.

¹ Selkirk v. Murray, 28th Nov. 1815, cited 2 Bell, 194, note 3.

² Bean v. Strachan, 1st August 1760, Morr. 907.

³ 2 Bell, 194.

⁴ Ibid.

transference by him, without indorsation, of bills or notes blank indorsed, in his possession, since he thereby alienates a *jus crediti* which would otherwise have increased the fund for payment of his debts. The expression, (used in the statute,) “translation” of “lands,” &c., and “debts,” seems strictly applicable to such a kind of transference.

8. The act contains also a clause which enacts, that, “in case any of his Majesty’s good subjects, (noways partakers of the said frauds,) have lawfully purchased any of the said bankrupt’s lands or goods, by true bargains, for just and competent prices, or in satisfaction of their lawful debts, from the interposed persons trusted by the said dyvours; in that case, the right lawfully acquired by him, who is noways partaker of the said fraud, shall not be annulled in manner foresaid; but the receiver of the price of the said lands, goods and others, from the buyer, shall be obliged to make the same forthcoming, to the behoof of the bankrupt’s true creditors, in payment of their lawful debts.”

This clause protects third parties who acquire the right under challenge onerously and *bona fide* from the original receiver of it. Thus, when a father who was actually, but not notourly insolvent, gratuitously drew a bill payable to his son, which the latter indorsed for value, the indorsee was preferred to a creditor of the drawer, arresting the amount of the bill in the acceptor’s hands¹. In this case, there was proof that value had been given for the indorsation; and it would appear from the act that such proof is necessary in all cases even for a third party. He must also, in terms of the act, be “nowise partaker of the said frauds.” His right is, therefore, challengeable, when he must know of the objections to the right, as where the deed assigned to him bears that the original receiver is conjunct or confident with the granter², or that it was granted without value³. The last of

¹ Brodie v. Steven, 21st Nov. 1749, Morr. 907.

² Hay v. Jameson, 6th Feb. 1672, Morr. 1009; Spence v. Dick’s Creditors, 28th Nov. 1693, Morr. 1014; Leslie v. Leslie’s Creditors, 15th June 1710, Morr. 1018; Lyon v. Creditors of Easter Ogle, Jan. 1723, Morr. 1072. The question in these two last cases occurred with adjudging creditors of the receiver; but their situation appears to be the same in principle with that of purchasers. Vide 2 Bell, 196.

³ Vide cases cited in note 2.

these conditions cannot occur with bills or notes, because they generally bear to be for value, and are, at all events, presumed to be granted or indorsed for value. But the original receiver may be so described in them, as to shew that he is conjunct or confident with the granter. But, even in this case, it will be a sufficient defence to the second grantee, that the original granter was believed to be solvent at the date of the first deed, or rather that he was not then generally known, and that there is no evidence of this grantee knowing him to be insolvent¹; for, unless in the case of diligence begun at the time against the original granter, which is provided for by another clause of the act, fraud is not presumable against a third party merely from the granter's insolvency, unless it is proved that it was known to him².

Although the reduction under this clause of the act should be brought only by one creditor, the effect of it, under the act, is not to give him a preference, but merely to set free the fund which has been conveyed away for the diligence of all the creditors³.

II. The second branch of the act 1621 enacts, that “if
“ in time coming any of the said dyvours, or their interpo-
“ sed partakers of their fraud, shall make any voluntary pay-
“ ment or right to any person in defraud of the lawful and
“ more timely diligence of another creditor, having served in-
“ hibition or used horning, arrestment, comprising, or other
“ lawful means, duly to affect the dyvour's lands or goods, or
“ price thereof to his behoof; in that case, the said dyvour
“ or interposed person shall be holden to make the same forth-
“ coming to the creditor having used his first lawful diligence,
“ who shall likewise be preferred to the co-creditor, who,
“ being posterior unto him in diligence, hath obtained pay-
“ ment by the partial favour of the debtor, or of his interpos-
“ ed confident, and shall have good action to recover of the
“ said creditor that which was voluntarily paid in defraud of
“ the pursuer's diligence.”

¹ The last of these alternatives, (and consequently the first *a fortiori*), is implied in the opinion of the Court in *Spence v. Dick's Creditors*, Murr. 1016.

² 2 Bell, 196.

³ *Ibid.*

This clause cannot apply to bills or notes considered as assignments of the bankrupt's funds, in prejudice of inchoate diligence, unless so far as such diligence would otherwise have attached the funds. It does not therefore appear at first sight to affect the indorsement of such documents, or the assignation which it implies of the drawer's funds in the drawee's hands, when the draft has been previously accepted, or intimated to the drawee. For these funds, as has been already shewn¹, are transferable by every indorsation of the bill; and, as such indorsations cannot be restrained by diligence, neither can diligence attach the funds, because they must follow the document that forms the title to them. But it has been shewn, that an arrestment in the acceptor's hands, by the creditor of a payee or indorsee, will be effectual so long as the payee or indorsee remains *in titulo* of the bill; and, perhaps, the act, by prohibiting all deeds in prejudice of prior diligence, may be held to restrain any indorsement which might render the arrestment ineffectual. *2dly*, This provision of the act seems to apply, when the debtor gives a draft to a third party on a debtor of his, in whose hands one of his creditors was prepared to arrest the money due to him, had it not been previously assigned by intimation of the draft. This competition can only exist with regard to money, as it alone can be conveyed by such a draft². But, *3dly*, The act has been considered as applying to all obligations on which the obligee may use diligence against the debtor's estate in prejudice of other diligence previously begun; in which view, it must be held applicable, *inter alia*, to the granting or indorsing of bills or notes.

The following are the leading points of the enactment, especially with reference to bills and notes:

1. It is intended to protect diligence against moveables, as well as against heritage, since it speaks expressly of "homing, arrestment, comprising or other lawful means, duly to affect the dyvour's lands or goods," or price thereof.

2. It does not strike against money payments by the bankrupt, since it is only intended to protect those funds which are attachable by diligence, whereas diligence cannot attach

¹ *Antea*, 289, et seq.

² *Antea*, 176.

money in the bankrupt's possession¹. But the provision against "voluntary payments" was perhaps meant to denote payments made by giving away such effects as could otherwise have been attached by diligence. The word is thus applied, in an early case², to a transaction by which some sheep were transferred to a creditor in satisfaction of his debt.

3. The mere words of the act, as they refer simply to the making of "any voluntary payment or right to any person, in defraud of the lawful and more timely diligence of another creditor," seem to apply to alienations of such funds only as would otherwise have been affected by the diligence³; and, in that view, has reference to bills, only in so far as the debtor's drafts or indorsements carry off his funds in the hands of third parties, which were *in cursu* of being attached by arrestment. It applies to such drafts or indorsements, though given in security of prior debts. But, besides, the Court has held deeds to be in defraud of diligence, *e. g.* bonds for illiquid debts, when they enable the grantee to follow out diligence more speedily to the prejudice of other diligence previously commenced. On this ground⁴, they reduced a bond of corroboration, granted to a creditor after a first adjudication had been led, though it only constituted the debt, and enabled the creditor to come *in pari passu* with the adjudger, which might have been done by a constitution and by adjudging within year and day. This principle applies to all obligations, whether bonds or bills. But⁵, when a debtor, after inhibition against him, granted a bill to a creditor merely in exchange for a former bill, the new bill, being afterwards made the ground of an adjudication, was sustained against an objection by the inhibiting creditor, on the ground that it "did not constitute a new debt," but was "a renewed docu-

¹ *Forbes v. Brebner and others*, 26th Jan. 1751, Kilk. 62, Elchies, No. 26, v. Bankrupt, 2 Bell, 201, note 4. The competency of pointing bank notes in the debtor's possession was questioned, but not decided, in *Alexander v. M'Lay*, 10th Feb. 1826, 4 S. and D. 439.

² *Tweedie v. Din and others*, 7th June 1715, Morr. 1037.

³ *Vide* Mr Bell's remarks on this subject, ii. 203.

⁴ *Dunbar's Creditors v. Grant*, 18th June 1793, Morr. 1027. *Vide also* *Scott v. Bruce*, 19th Jan. 1788, mentioned by Mr Bell, ii. 203, note 1.

⁵ *Douglas, Heron and Co. v. Brown*, 24th July 1785, Morr. 7070.

“ment only of an old one,” and did not place the creditor in a better situation than formerly.

4. The act does not strike against bonds or bills for new debts, or the sale of lands or goods for a price instantly paid; these being transactions in the ordinary course of business, and the burden which they bring on the debtor's estate being compensated by the value given for them ¹.

5. The diligence “in defraud” of which the deed challenged is granted must have been regularly begun before the deed, and must be timeously followed out. The act assumes that the challenging creditor has “served inhibition, or used “horning, arrestment, comprising,” &c. It appears to be now settled, that diligence must be begun of that kind which is appropriate to the peculiar rights affected by the deed challenged ². Thus, a deed which affects moveables only, cannot be challenged by a creditor who has used only inhibition. But, if the deed affects heritage, an inhibition, though only executed, and not recorded, will be a sufficient ground for reducing it ³. It appears to be now almost settled, that horning, not being in general a necessary step of diligence against heritage, cannot authorise a challenge of rights which affect heritage only ⁴, unless when it is necessary as a warrant for adjudication ⁵. On the other hand, as horning is the initial step in a poinding, it warrants the challenge of all deeds affecting subjects which may be carried by poinding ⁶. The statute, indeed, mentions “horning” as one diligence which authorises a challenge. But, when the fund in question is only arrestable; for instance, when the bankrupt gives a draft on a third party for a fund in his hands, a horning affords no warrant for challenging the draft, because the proper diligence for attaching it is arrestment, which is competent without horning ⁷.

The diligence begun must be free from fatal objections;

¹ This has been settled by a number of cases; *Veitch v. Pallat*, 11th Nov. 1673, *Morr.* 1029; *Nelson v. Ross*, 8th Feb. 1681, *Morr.* 1045; *Monteith*, 28th June 1665, *Morr.* 1044, and is also implied in *Bathgate v. Bowdoun*, 25th Jan. 1681, *Morr.* 1049. *Vide also Stair*, i. 9. 15; *Ersk.* iv. 1. 37.

² *Ersk.* iv. 1. 39; 2 *Bell*, 199-200.

³ 2 *Bell*, 200.

⁴ *Erskine*, iv. 1. 39; 2 *Bell*, 200.

⁵ *Murray v. Drummond*, 18th July 1677, *Morr.* 1048.

⁶ *Erskine*, iv. 1. 39.

⁷ *Vide* 2 *Bell*, 200.

because otherwise, it is not diligence calculated, in terms of the act, “*duly to affect the dyvour’s lands or goods,*” &c.

The creditor must follow out his diligence *tempestive*, as the statute allows reduction only of the rights granted “in defraud of the lawful and *more timely* diligence of another creditor.” It has been therefore decided, that a creditor lost the benefit of the statute by neglecting for five ¹, or four months ², or for a longer period ³, to follow out his diligence.

But, besides, it is necessary,

6. That the debtor’s insolvency, at the date of the deed, should have been notorious, or the receiver of the deed privy to his fraud ⁴.

The question, whether the challenge, if successful, accrues to the challenging creditor singly, or in common with other creditors, depends, in so far as regards moveables, on the principles already laid down with regard to the equalization of all diligences against moveables used within a certain period of bankruptcy ⁵. Its effect, as to diligence against heritage, depends on the rule regarding the *pari passu* preference of all adjudications used within year and day of the first effectual adjudication.

7. The clause in question merely enacts, that “the said dyvour or interposed person,” (which person has been previously described as “their *interposed partakers of their fraud,*”) “shall be holden to make the same, viz. the subjects conveyed or their price, forthcoming to the creditor having

¹ Drummond v. Kennedy and Reid, 9th July 1709, Morr. 1079.

² Young v. Kirk, Nov. 1688, Morr. 1078.

³ Duff v. Bell’s Representatives, 22d July 1742, Morr. 1059. It seems to have been implied in this case, that horning afforded a warrant for challenging the assignation of a debt, though the debt was only affectable by arrestment. But the creditor was held to have lost his right of challenge, by delaying for a number of years to follow up the horning with arrestment.

⁴ In The Royal Bank v. Kennedy, 24th Feb. 1709, Morr. 1058, the Court found the challenged right (which was an assignation) reducible, “unless the assignees would prove that, at the time of his (the debtor) granting the assignation, he was holden and reputed to be solvent.” But in a subsequent case, Tweedie v. Din and others, 7th June 1715, Morr. 1040-1, they threw the *onus probandi* on the challenging creditor, holding that denunciation with insolvency was not sufficient to found a challenge under the act, “unless the common debtor had been commonly reputed bankrupt, or that the pursuer can qualify that the defenders were some way partakers of the fraud.” This is nearly the doctrine laid down in the text.

⁵ *Antea*, 717.

“used his first lawful diligence.” These words seem to import that the challenge shall be personal against the bankrupt or the partakers of his fraud, (which parties receiving deeds from him, under the circumstances provided against by the statute, are held to be,) and there is no declaration of a total nullity of the right, even when transferred to third parties. The latest authority on this subject is hostile to such nullity¹. It may therefore be held that drafts and indorsements, or bills and notes, though falling under the act, will be effectual to any subsequent indorsee, unless he is proved to have been privy to the bankrupt’s fraud.

III. Act 1696, c. 5.

That statute, after giving the description of bankruptcy already mentioned, (as extended, in manner formerly noticed², by 54 Geo. III. c. 137,) enacts, that the debtor’s bankruptcy “being found, by the Lords of Session, at the instance of “any of his just creditors, who are hereby empowered to “raise and prosecute a declarator of bankrupt thereanent, “his Majesty, with consent of the Estates of Parliament, “declares all and whatsoever voluntar dispositions, assignments, or other deeds, which shall be found to be made and “granted, directly or indirectly, by the foresaid dyvour or “bankrupt, either at or after his becoming bankrupt, or in “the space of sixty days of before, in favours of his creditors, “either for his satisfaction of farther security, in preference “to other creditors, to be void and null.”

I. *Nature of the Deeds challengeable.*

The clause in question strikes against all dispositions, assignments, or other deeds granted by a bankrupt, at, after, or within sixty days before bankruptcy, in satisfaction or security of prior debts, and therefore applies to the indorsation of bills or notes, in security or satisfaction of debts; as they are assignments in terms of the act. The delivery of such documents blank indorsed is also challengeable. Such delivery of bills is an assignment of funds in the drawee’s hands, and, besides, the delivery of bills or notes for prior debts,

¹ 2 Bell, 204.

² *Antea*, 665.

is included in the statutory expressions "other deeds." A draft by the bankrupt on his debtor is also challengeable, as being an assignation of funds¹. Even the acceptance of a bill, or subscription of a note, for an illiquid debt, falls under the act, being a security, inasmuch as the debt is thereby better secured than before.

1. Drawing or indorsing.

In the first case of this kind, where an inland bill had been drawn by a debtor, in security of a prior debt within sixty days of his bankruptcy, on a party who accepted², the Court set aside the bill, in a competition between the payee and the other creditors, finding "bills included within the act of Parliament as well as other assignations, *unless they bore value*

¹ *Antea*, 174, *et seq.*

² *Durward v. Wilson*, 2d Feb. 1700, Morr. 1119. There are several cases decided about the same time, which Forbes notices shortly, 171-3, and which deserve to be perused, as illustrative of the state of the law at that time. The grounds of exemption from the statute given in *Durward v. Wilson*, appear questionable, for the following reasons: 1st, A person holding a bill would not be obliged, in the ordinary case, to *prove* value received; because, though the bill does not, according to the act 1621, instruct its onerous cause, if granted to a conjunct or confident person, instant value would be presumed in other cases. This point was decided in two cases, *Mansfield, Hunter and Co. v. M'Ilwham*, 10th March 1770, Morr. App. to Bill, Part I, No. 2; and *Mansfield and Co. v. Douglas*, 11th Dec. 1770, *ibid.*, where the acceptor of a bill having suspended a charge on it by an onerous indorsee, on account of arrestments in his hands by creditors of the drawers, who had become bankrupt, and pleading that it might appear, either that the bill had been indorsed to the holder within the sixty days, or that he held it in trust for the drawer, the Court, in one case, remitted to the Lord Ordinary on the Bills, that the suspension might be refused, if the holder deposed that he had given present value for the bill; and in the other case, refused the suspension *de plano*. 2dly, In order to make a bill or note challengeable under the act 1696, the challenging creditor must *prove* that it was granted in security or satisfaction of a prior debt. 3dly, If this is proved, it will not, as the decision in question seems to imply, be a defence, that the bill bears to be for "value received," since these words may be intended to cover the fraud which it is the purpose of the statute to detect. But the decision was sound, in so far as it set aside the bill. Forbes, in noticing this case, says, that the decision was influenced by the circumstance of the person who got the bill being the drawer's nephew. That circumstance would now be sufficient in itself to have warranted a reduction of the bill under the act 1621, unless value was proved to have been given for it. But from several other cases cited by Forbes, 173-4, it appears that, in his time, the mere statement in a bill of "value received" would, in the ordinary case, have superseded the necessity of proving value in questions under the act 1621, although the words "value in account" would not have done so.

"received, or so proven." These grounds of exception from the act do not seem to be correct, for the reasons stated below.

In the next case¹, the Court set aside the indorsation of a bill by a bankrupt within sixty days of his bankruptcy to a prior creditor, holding correctly that the act 1696 takes place, if the suspender, (the challenging creditor,) "prove that the indorsation was in satisfaction or security of a prior debt, and not for present value received." The burden of proof was here laid, in terms of the act, on the creditor; and, at the same time, it was implied that such a proof, if adduced, would be effectual, whatever were the terms of the bill.

In the next case², which involved also a question as to the effect of a bill blank in the drawer's name, the Court, with reference to an objection against the indorsation as granted in security of a prior debt, set it aside in as far as it had been so granted. They also³ set aside the indorsation of a bill granted by a debtor to two of his creditors within sixty days of bankruptcy, though the decision was accompanied with a reservation, to be afterwards noticed. The rule was confirmed in many other cases; for instance, in two cases⁴, where the indorsations of bills, so far as in security of prior debts, were set aside. In another case⁵, where a creditor in a bill had executed a pouncing of his debtor's goods, and obtained a warrant of sale, but before the sale the debtor had sold the goods privately, and taken a bill for the price, which he indorsed to the pouncing creditor in security of the former bill, the indorsation was reduced under the act 1696; and, as it was held that the purpose of this transaction had been to defeat the *pari passu* preference which the other creditors would have obtained if the pouncing had been completed, the Court ordered the fund to be apportioned among them, as if such a preference had taken effect. In a later case⁶, a draft in security of a

¹ Campbell v. Graham, 16th Jan. 1713, Morr. 1120.

² Nelson v. Russell, 14th Feb. 1734, Morr. 1435, 1508, 1685.

³ Campbell v. M'Gibbon and Campbell, 10th August 1780, Morr. 1139.

⁴ Robertson v. Ogilvy, 21st Nov. 1798, Morr. App. to Bill, 8; Blairie v. Wilson, 1st July 1803; 2 Bell. 211, note 6.

⁵ Neil and Thomson v. Forrester and others, 14th June 1815, F. C.

⁶ Ritchie v. Wyllie, 27th Nov. 1821, 1 S. and B. 169.

former bill due by the drawer to a third party was set aside, though it was pleaded that the draft was for instant value, inasmuch as the first bill had been given up in consideration of it. The application of the statute, therefore, to the drawing or indorsation of bills and notes, is fully settled.

2. Delivery of bills and notes.

The statute is equally applicable to delivery, by the bankrupt, of bills or notes blank indorsed. In one case¹, it was even decided that the mere deposition of a bill, with or without indorsation, in security of a prior debt, followed by payment of part of it to the creditor, was challengeable under the act 1696. The bankrupt had deposited the bill with his creditor, on a receipt agreeing to deliver it up on payment of the debt, and subsequently, the bill was paid by the acceptor, who placed £.160 of it to the creditor's account, and the residue to the bankrupt's account. The bills had been indorsed by the bankrupt; but it did not appear whether the indorsement had been made at the time of the original deposition or afterwards. Some of the Court held that there was evidence of the bill being indorsed at the time of deposition; and in that case the statute was undoubtedly applicable, in terms of the foregoing decisions. But they held, besides, that the deposition, with subsequent payment, formed parts of one scheme *ad fraudem faciendam legi*, by securing a preference, and that it was not a direct payment of the debt; but a "deed" for "satisfaction or farther security" of it. This decision proves *a fortiori*, that delivery of bills or notes blank indorsed falls under the act, since it vests a complete right, and is therefore a security from the time when it is made.

3. Accommodation bills or notes.

Indorsement or delivery by the bankrupt of a bill or note, accepted or granted for his accommodation, is not challengeable under the act 1696; as it provides only against deeds granted "in satisfaction or farther security, in preference to other creditors;" thus indicating that the deed must tend to carry off some actual fund. But if the creditor receiving an ac-

¹ *Manson v. Angus*, 10th July 1771, *Morr. App. to Bankrupt*, 16; affirmed on appeal.

commodation bill or note recovers payment under it, his claim is *pro tanto* extinguished, while the accommodation-acceptor's claim of indemnity is substituted; so that the estate neither gains nor loses¹. If the document had remained in the bankrupt's hands, it would have been unavailable either to him or his creditors. The same rule has been adopted in England.

There, when a debtor commits an act of bankruptcy, the interest in his estate is vested in the assignees appointed under a commission of bankruptcy issued against him; and this judicial transference draws back to the date of the first act of bankruptcy, so that, under certain exceptions in favour of acts in the ordinary course of trade, all alienations of his property, or deeds by which it may be burdened, and consequently all indorsations of bills due to him², after the first act of bankruptcy, are challengeable by his assignees. But it has been decided³, that the indorsement by him to a creditor, after an act of bankruptcy, of a bill accepted for his accommodation, is available to the indorsee against the acceptor, seeing the assignees have no good interest to set it aside.

In another case⁴, a person having taken from his debtor, after the latter had, without his knowledge, committed a secret act of bankruptcy, an indorsement, in security of his debt, to an acceptance by a third party in the bankrupt's favour, the indorsee was held to have no claim under the indorsement, so far as the bill was accepted for value of the drawer in the acceptor's hands; because, from the date of the former's act of bankruptcy, that value, as forming part of his estate, was vested in his assignees; but that, so far as it was accepted for his accommodation, neither the bankrupt nor his assignees had any interest to dispute the indorsee's right to it, since it could not be available to them. The Court also laid down the doctrine already stated, that, though the acceptor should claim indemnity from the bankrupt's estate, in so far as he was obliged to pay the bill for the bankrupt's accommodation,

¹ 2 Bell, 210.

² Smith v. De Witts, 6 D. and R. 120.

³ Arden v. Watkins, 3 East. 122; Wallace v. Hardacre, 1 Campb. 46-7, per Lord Ellenborough.

⁴ Willis v. Freemauf and another, 12 East. 656.

this would create no new burden against the estate, because his claim would come in place of that of the indorsee. On the other hand, when a bill has been accepted, in consideration of a cross bill accepted by the bankrupt for the drawer's behoof, the bill thus accepted cannot be indorsed by the bankrupt, because it forms a good ground of claim to his assignees against the acceptor's estate¹. The same ground of objection would exist in Scotland under the act 1696.

The indorsement of an accommodation-bill would be challengeable under the statute, when the party accepting it for the bankrupt's accommodation obtained, for his indemnity, a security over the bankrupt's estate. Such an indorsement injures the estate, inasmuch as the acceptor will indemnify himself from the security, so far as he pays the bill, so that the creditor will indirectly get the benefit of the security. Such a case was lately decided against the security², in a reduction of a bill drawn by a debtor upon, and accepted by, his son, in security of two bills due by the father to a bank, the son having previously received for his indemnity an heritable bond from his father, on which he was infest. The bill was held, under these circumstances, to be a security by the bankrupt in preference to the other creditors.

4. Granting of bills or notes for previous debts.

The acceptance of a bill, or subscription of a note, by the bankrupt, in favour of a creditor, if it improves his situation; *e. g.* by giving him a liquid document for an illiquid debt, falls within the statute, being truly a deed for the creditor's "farther security in preference to other creditors." The Court was once of a different opinion. Thus³, where a bill had been protested for non-payment, it was decided that a new bill granted to the holder by an indorser, not only for the principal sum contained in the first bill, but for the interest, re-exchange, and charges incurred on it, did not fall under the act 1696, though given within sixty days of the grantor's bankruptcy. But it undoubtedly gave him "farther security," in so far as regarded the interest, re-exchange, and charges on

¹ 1 Campb. 179, note to *Kent v. Lowen*.

² *Duncan's Trustee v. Low*, 11th Dec. 1822, 2 S. and D. 77, F. C.

³ *Cowan v. Mansfield's Trustees*, 7th Jan. 1762, *Morr.* 1167.

the former bill, which were otherwise unliquidated. In another case ¹, it was pleaded, *inter alia*, that a promissory-note granted by a bankrupt to one of his creditors, within sixty days of bankruptcy, fell under the act 1696, as it enabled the creditor to rank more than once for the same debt, viz. first on the estate of the bankrupt who granted it, and, secondly, on the estate of a third party who had indorsed it in consideration of a security given him by the bankrupt. But this plea is said to have been disregarded. But a different rule was adopted, after full discussion, in a subsequent case ², which related to the validity of a bond of corroboration granted within sixty days of the grantor's bankruptcy, *first*, for debts due to the grantee's father, which therefore the grantee could not have acquired without confirmation; *secondly*, for debts of which the term of payment had not arrived; and, *thirdly*, for accumulations of principal, interest and expenses on the debts. It was admitted that this bond was challengeable so far as the debt was enlarged by it, or a penalty superadded, beyond what was due by law; and it was at last agreed, that even accumulations which did not arise *ipso jure*, *e. g.* the accumulation of interest on interest, must be struck off. But the majority of the Court farther decided that the bond, even as to the principal debt, was challengeable *in toto*, inasmuch as it gave the grantee a preference over the other creditors, by enabling him to proceed more rapidly with diligence. This doctrine was confirmed in a case ³, where a person having granted a bond of corroboration within sixty days of his bankruptcy, accumulating into one sum bearing interest, *first*, a bill on which no diligence had followed; *2dly*, a bond in which the grantee of the bond of corroboration was his cautioner; and, *3dly*, a bond and bill in which the latter was really cautioner, though *ex facie* of the documents he was joint obligant, (the three last of these debts having been also paid by him,) the Court reduced the bond of corroboration

¹ Swinton's Trustee v. Sir William Forbes and Company, 19th Feb. 1790, Morr. 1181.

² M'Math v. M'Kellar's Trustee, 1st March 1791, Morr. 1114, where the Faculty report of the case is given. But the grounds of judgment are more fully explained by Mr Bell, ii. 213, note 1.

³ Dunbar's Creditors v. Grant, 18th June 1793, Morr. 1027.

in toto, holding, "that a bankrupt ought to execute no deed " by which the situation of his creditors is affected, and that " it would be dangerous to support any deed of that nature." Though these two decisions did not relate to bills or notes, their principle is applicable to such documents, when they give the grantee a greater advantage over the other creditors than he had before. This will not generally be the effect of a bill or note granted as a substitute for a former bill or note, unless the former document has been due for more than six months without recording a protest, in which case the substituted bill or note would probably be reducible, as giving the grantee the benefit of summary diligence, which he had lost on the first document ¹.

There are several transactions as to bills or notes which have been exempted from the act, though some of them would appear at first to fall under it.

1. Payments.

It has been already shewn ², that payments made by a bankrupt on account of debts fallen due are in general valid, as they form a necessary part of the debtor's administration of his own affairs. The words of the act 1696, c. 5, indicate that it is applicable only to deeds of preference granted for the creditor's "satisfaction or farther security," not to payments, by which the debt is extinguished. The only question on this subject has been, whether, besides cash payments, the practice of trade does not also sanction, to a certain extent, payments by bills or notes?

First, Though navy bills, bank-notes, or bankers' notes in common circulation are not properly cash, yet, if they are generally received as such, the delivery of them in payment will be held payment in cash.

Secondly, Even the acceptance of bills, indorsation of bills or notes, delivery of them blank indorsed, or the granting of drafts, will be sanctioned as payments, if they are given as such, and agreeably to the usual mode of making payments in the course of trade. The act 1696 does not strike against drafts or indorsations *nominatim*, but only so far as they give

¹ 2 Bell, 213-4.

² *Antea*, 672.

the favoured creditor “satisfaction, or farther security,” in preference to other creditors; and, therefore, it does not apply to them when given only in payment. No doubt, though such documents should be given in payment of a debt, and the creditor should discharge it on receiving them, the discharge is still conditional, so that, if they turn out bad, the claim will revive. But they are payments in the contemplation of the parties, as much as by navy bills or the notes of banking companies, which are liable to the same contingency.

The English bankrupt law affords an illustration of this doctrine. According to its original principles, the commissioners on a bankrupt's estate acquired right to it retrospectively from the first act of bankruptcy, however secret¹, and they were thus entitled to set aside all sales or payments by the bankrupt after an act of bankruptcy², though he had transacted business after it as usual. This rule was relaxed, regarding payments to the bankrupt, by 1 Jac. I. c. 15, § 14, which enacts, “That no debtor of a bankrupt shall be endangered for the payment of his debt truly and *bona fide* to any such bankrupt, before such time as he shall know or understand that he is become a bankrupt.” Afterwards it was enacted, by 19 Geo. II. c. 32, § 1, that no person who is creditor of a bankrupt, in respect of goods sold, or of bills “drawn, negotiated or accepted by such bankrupt in the usual and ordinary course of trade and dealing,” shall be liable to repay to the assignees “any money, which, before the suing forth of such commission, (*viz.* the commission of bankruptcy,) was really and *bona fide*, and in the usual and ordinary course of trade and dealing, received by such person of any such bankrupt, before such time as the person receiving the same shall know, understand, or have notice, that he is become a bankrupt, or that he is in insolvent circumstances.” By a later statute³, it was enacted, that “all payments by a bankrupt *bona fide* made more than two calendar months before the date of the commission, shall, notwithstanding any prior act of bankruptcy committed by such bankrupt, be good and effectual to all intents and purposes,”

¹ *Vide* Cooke's Bankrupt Law, i. 586, 8th edition.

² *Ibid.*

³ 46 Geo. III. c. 135, § 1.

provided the payee had not notice of the act of bankruptcy or of insolvency. In construing these acts, it was decided, that bills accepted or indorsed in the common course of trade for a debt due, are payments, provided they are discharged when they fall due. Thus ¹, where a party who owed another a sum as his factor, in the sale of goods, accepted at his request a bill drawn by him for part of the debt, and indorsed a bill for the balance, both of which were retired when due, it was held, though there was no receipt for payment on obtaining the bills, that they were payment of the debt, and that, therefore, though the creditor had committed an act of bankruptcy before receiving them, the transaction was protected as a *bona fide* payment under the 1 Jac. I. Again, in a question ² under the 19 Geo. II. c. 32, whether the indorsement of a bill by a debtor to his creditor, in satisfaction of the debt, after the indorser had committed a secret act of bankruptcy, was a payment in the ordinary course of trade, the Lord Chancellor held that it was, and was protected by the statute, provided the bill was retired before issuing the commission. This condition arose from a provision in the statute, that the payment should be valid only when *made* before the date of the commission, which could not be till the bill is paid, as it cannot be known, till then, whether there is an effectual payment or not.

But the question, what are payments in the ordinary course of trade, is now simplified by 6 Geo. IV. c. 16, which repeals the 19 Geo. II. c. 32, and *inter alia* enacts, "That all payments really and *bona fide* made, or which shall thereafter be made by any bankrupt, or by any person on his behalf," (before the issuing of the commission of bankruptcy,) "to any creditor of such bankrupt, (such payment not being a fraudulent preference of such creditor,) shall be deemed valid, notwithstanding any prior act of bankruptcy." It farther enacts the same thing as to payments made to the bankrupt, and declares, "that such creditor shall not be liable to refund such payment, provided he had not, at the time

¹ Wilkins v. Casey, 7 T. R. 711.

² Hawkins v. Penfold, 2 Ves. sen. 550, per Lord Chancellor Hardwicke. Vide also Hall's Assignees v. Spackman, C. and Pay. 274, per Best, C. J.

" of such payment by or to such bankrupt, notice of any act
 " of bankruptcy by such bankrupt committed." This act excludes all questions as to what are payments in the ordinary course of trade, to which it makes no reference, and also as to what is notice of insolvency. But the question, in what cases indorsements of bills or notes are payments, appears to depend on the same principles as formerly¹, which have now been explained.

In Scotland, although the doctrine now explained was once disputed, it is now quite settled. 1st, It has been decided, that payments or remittances to a current-account between merchants, or between a banker and his customer, by cash or bills, are effectual, whether the balance is for or against the party making the remittance, which can be held only on the ground, that remittances by bills are payments². 2d, It follows *a fortiori*, and is also settled, that the indorsation of a bill for the purpose of being discounted, and its proceeds applied in payment of a single debt, does not fall under the act 1696³, or the payment of a bill past due by a draft on London at twenty-five days, when drafts at par were at twenty days⁴, or the payment of a debt *pro tanto* by a check on a banker, or a bill at a discountable date, settling the difference in cash⁵, or a bill given and received as cash, in payment of goods delivered⁶. These points may be considered as now ascertained⁷.

But this doctrine applies only to transactions intended *bona*

¹ Chitty, 233.

² Stein's Trustee v. Sir William Forbes and Co., 1st March 1791, Morr. 1142; 2 Bell, 218, note 4; Sandieman and Graham's Trustees, 1792, 1 Bell's Cases, 81, and 16th Nov. 1790, Morr. 14111; Richmond and Freebairn's Trustee v. Pelican Insurance Office, 26th June 1805, Morr. App. Bankrupt, No. 24, 2 Bell, 218, note 4; Dundas v. Smith, 2d June 1808, Morr. App. A. t. No. 28; Dickson, Langdale and Co. v. Cowan, 3d Dec. 1828, 7 S. and D. 132.

³ Jamieson v. Ferrier, 23d Jan. 1810, 2 Bell, 218, note 1.

⁴ Ferrier v. Newton, 2d June 1808, 2 Bell, 218, note 2; which compares with opinion as to bank-bills, in Campbell v. M'Gibbon, 690, note 3.

⁵ 2 Bell, 218, note 4; Hawkins v. Penfold, 697, note 2.

⁶ Watson v. Young, 1 March 1826, 4 S. and D. 507.

⁷ The changes of opinion on this subject are indicated by some of the earlier cases, as Campbell v. M'Gibbon and Campbell, 690, note 3, and 2 Bell, 217, note 3; and M'Hutcheon v. Welsh, 20th May 1794, 2 Bell, 217, note 4, compared with the later decisions now cited.

fide as payments; and, therefore, when the real intention of parties is to grant a security, the transaction will be reducible. Thus, when a person makes an advance to a trader, and, on the day of the advance, obtains from him a deposit of bills, in consequence of an alarm about his solvency, this is a security for a prior debt, not a payment, as the creditor would not exact payment of the advance on the very day of making it¹. Indeed, knowledge of the debtor's insolvency is sufficient *per se* to vitiate the transaction. The giving also of a bill at a distant date will be considered as a security, as bills cannot be regarded in mercantile construction as payments, unless payable at discountable dates. The giving, too, of a promissory-note will be challengeable, as it does not proceed, like the indorsement of a bill, on the assumption that there are funds in the acceptor's hands; but it is an expedient to gain indulgence, and the note, if discounted, must be so on the grantor's credit, *being a security over his estate*. It has been also found in England², that, when a party for whose accommodation certain bills had been drawn, sent money to the drawer, after he had committed an act of bankruptcy, and before they became due, to take them up, this was not a payment in the ordinary course of business. In Scotland, it would be accounted a deposit in security of the drawer's claim of relief, and would therefore be reducible under the act 1696. This doctrine was recognised in a case, where a provision made for payment of a bill before it became due, by lodging with the indorser the price of some heritable property sold by the bankrupt to raise money, was, after a contrary decision by the Court of Session, ultimately decided, in conformity with a special remit from the House of Lords, to be reducible under the act 1696³.

A similar decision was given since, regarding the appli-

¹ *Vide Hotchkis v. The Royal Bank*, July 1796, 2 Bell, 219, note 4, where the Court are said, under the circumstances stated in the text, to have held that the deposit of bills was challengeable as a security for a prior debt. The case was not finally decided, as the Bank gave up the bills, in consequence of this opinion of the Court.

² *Tamplin v. Diggins*, 2 Campb. 311, *per* Lord Ellenborough.

³ *Speir v. Dunlop*, 15th June 1825, 4 S. and D. 92, 22d May 1826, 2 W. S. App. Cas. 253, 30th May 1827, 5 S. D. 729.

cation of bills and orders remitted by a person, within sixty days of his bankruptcy, to his ordinary bankers, to the payment of different instalments of a bond due by him to them, it being held, that such remittances, in the ordinary course of business, were valid, and might be applied by the bankers as cash, to pay instalments of the bond which were past due; but that, as to an instalment not yet due, they could not be applied to it, by an order from the bankrupt, without falling under the act 1696, as a provision or security ¹. As to the question, however, whether the funds in their hands might be retained by them in security of that instalment, it was held ultimately to depend on the matter of fact, whether these funds had been lodged in the ordinary course of business, or with a special view to the security of the third instalment; and on that point an inquiry was ordered ², which terminated against the bankers ³. Certain other funds and bills were held to have been transferred to them in the ordinary course of business, and, as to these, there was a verdict in their favour ⁴.

It has been also decided, that after a bill has been protested for non-payment, the indorsement of another bill on account of it, within sixty days of the indorser's bankruptcy, is reducible under the act 1696; as the debtor, by suffering the first bill to be protested, acknowledged his insolvency, and therefore the indorsement must be intended as a security in place of payment ⁵.

In a case ⁶ where the partner of a company employed to wind up their affairs, had recovered a certain amount of

¹ *Pattison v. Allan and Co.* 3d Dec. 1828, 7 S. and D. 144.

² *Do. v. Do.* 12th June 1829, 7 S. and D. 753.

³ *Do. v. Do.* 5 Murray's Reports, 231, 9 S. D. B. 317.

⁴ *Low (Blinchow's Trustee,) v. Allan and Co.* 25th July 1834, 12 S. D. B. 948.

⁵ This doctrine was held by the Court, independently of certain specialities, in *Blaikie v. Wilson*, 1st July 1803, 2 Bell, 219, note 1, where it was found, that the indorsement by a debtor, within the sixty days, of bills by third parties due in three months, which he held blank indorsed, made on account of a bill which he had suffered to be protested, and could not pay in money, was challengeable under the act 1696, as an alienation of a certain fund to the prejudice of his creditors.

⁶ *Borthwick v. Wright and others*, 6th Feb. 1827, 5 S. and D. 203; *vide* also *Gilchrist v. Christie's Trustee*, 4th July 1809, 1 Bell, 264, note 3.

funds belonging to them, which he had not at first entered in their books, though he debited himself with it in his private books, and had afterwards expended an equivalent sum in retiring a bill on which the company were drawers, and which the acceptor could not retire, the Court, although this payment turned out to have been made within sixty days of the payee's bankruptcy, decided that it was not reducible by the trustee for his creditors under the acts 1621 or 1696, seeing he must be presumed to have made it from the company funds which he had recovered, and to hold as their manager, though he had not entered these funds in their books as recovered, till within fifteen days of his bankruptcy.

2. Bills or notes granted, indorsed, or delivered blank indorsed, or drafts made in payment of goods or other articles bought at the time, do not fall under the act 1696, because they are not given in satisfaction or security of prior debts. The sale, however, must be a ready-money transaction; and the granting or indorsement of the bills, notes or drafts must form *pars ejusdem negotii* with the sale. If that is the case, the bills or notes will be effectual to the creditor, though granted or indorsed a few days after the sale, provided the interval is not greater than usually takes place in such transactions. Thus, in a sale of wheat for ready money¹, where the money was to be paid on delivery of the last parcel, but the seller was obliged, five days after, to take an indorsed bill at a negotiable date from the buyer in part payment, the Lord Ordinary and the Court, holding that this was a mode of payment usual in such ready-money transactions, sustained the indorsation, though granted within sixty days of the indorser's bankruptcy. But such a transaction, to be valid, must be entered into *bona fide*, and not a mere scheme to evade the statute. Thus², where a person who was debtor to another got his brother to join him in a bill for the debt, and thereafter, about the time of his bankruptcy, delivered to his brother some wool, which the latter gave over to the principal creditor, and got up the bill from him, the Court disregarded

¹ Thomson's Trustee, 28th Feb. 1806, Morr. App. to Bankrupt, No. 25.

² Young v. Johnston, 25th June 1783, Morr. 1141.

the plea, that this person virtually bought the goods from his brother, and was therefore entitled to transfer them to the creditor for a price, viz. the surrender of the bill, holding, that the transaction was evidently meant as a security to the principal creditor. Again¹, where a party bought goods from another, and agreed to give him bills for the price, but, instead of doing so, took an indorsement from a third party to bills which the seller owed to that party, (granting his own bills to the indorser for their amount,) and on the bills thus indorsed pleaded compensation against a claim for the price, the Court, even on the assumption, as to which the parties were at variance, that this indorsation had taken place *after the sale*, and consequently that the sale could not be considered as a security for it to *the indorsee*, held, notwithstanding, that the transaction was a fraud on the act 1696, being a device between the purchasers and the indorser of the bills, to obtain a security for the latter.

In another case², where a person who had given to another a bill for his accommodation, afterwards bought cattle from the party accommodated, and granted his bill for the price, but the seller, having become bankrupt next day, returned his bill, and the buyer then pleaded compensation against the price on the accommodation-bill which he had been obliged to retire, the Court, though contrary to the opinion of Lord Gillelles, Ordinary, held that the transaction was not challengeable, and sustained the plea of compensation. The bankrupt was here a direct party to the transaction, by which the only other party, one of his own creditors, was benefited. But the Court seems to have held that the sale was made *bona fide*, and that the security was merely a consequence flowing incidentally from it. The same remark is applicable to the preceding case, with this addition, that the bankrupt did not appear in it to have been a party to the preference. If it had been proved, in the last case, that the sale was merely a device to conceal the real purpose of granting a security, the transaction must have been set aside, as falling under the act.

¹ *Marshall's Trustee v. Provan and Company*, 21st Jan. 1794, *Morr.* 1146.

² *Hepburn v. Bell*, 11th July 1816, 2 *Bell*, 214, note 1.

In a case¹, where a debtor had been released from imprisonment by his creditor, for the purpose of validating a sale by him to a third party, made in order to obtain a bill for the price, which he immediately delivered to the creditor's agent, after which the creditor's name was filled up as drawer, the amount of this bill, after it had been paid, was recovered back, on the ground that it had been truly granted as a security by the debtor to this creditor, to the prejudice of his estate and of the other creditors. The creditor endeavoured to shew that the bankrupt estate had not been injured, as the purchaser had not got credit for the payment against the estate. But the contrary was established; and, therefore, though the purchaser was not proved to be implicated, the transaction, as between the bankrupt and the creditor's agent, or, in other words, with the creditor, was clearly a security under the act 1696. A similar decision was given in another case, where this case was recognised as an authority²; and also in a case where a party, who was bound to retire a bill accepted for his accommodation, and which was past due and protested, sold some horses to the acceptor, five days before his sequestration, and applied the price in retiring the bill³. In another case⁴, already alluded to, the sale of a property by the bankrupt, to raise money as a provision for paying a debt before it was due, though the creditor receiving it had no concern in the sale, was ultimately, after a special remit from the House of Lords, held to be reducible under the act 1696. In another case⁵, where a party who had a cash-credit with a bank, on the security of two cautioners, sold a house and land, within sixty days of his bankruptcy, with the assistance of one of the cautioners, after saying that he wished to do so, to pay up his cash-account, and gave the cautioner an order for the price, which the latter paid into the credit of the cash-account, the Court, although it was not proved that this cautioner knew of the debtor's insolvency, or that the purchaser

¹ *Barbour v. Johnston*, 30th May 1823, 2 S. and D. 351.

² *Ramsay v. Kirkwood*, 11th June 1829, 7 S. and D. 749.

³ *Stewart v. Scott*, 4th Dec. 1832, 11 S. D. B. 171.

⁴ *Speir v. Dunlop*, 15th June 1825, 4 S. and D. 92; 22d May 1826, 2 W. S. 253, and 30th May 1827, 5 S. and D. 729.

⁵ *Mitchell v. Rodger and Smith*, 26th June 1834, 12 S. D. B. 802.

or other cautioner knew the purpose of the transaction, held that it was intended to give the cautioners a preference, contrary to the act 1696, and therefore reduced it with regard to them.

3. Bills or notes granted or transferred in consideration of debts contracted at the time of transference do not fall under the act 1696. That act strikes against deeds granted to creditors for their satisfaction or security "in preference to other creditors;" thus implying, that all parties were creditors before the date of the deed; and, therefore, it does not refer to debts contracted at the date of the deed, and in consideration of it. It relates, indeed, solely to deeds granted for the "satisfaction or farther security" of debts, thus assuming that the debts have a separate existence, not that they are created by the deed which constitutes the security. Besides, the bankrupt does not here burden his estate or lessen its value, but gives a security for a full consideration, which may be applied to the benefit of his creditors. Accordingly¹, where the indorsation of a bill was challenged under the act, the Court, while they set it aside, as granted in security of a prior debt, held that it would have been valid if given for present value received. This doctrine has been held repeatedly as to other deeds granted for *nova debita*, but which are in the same situation on this point with bills and notes². The same doctrine seems applicable to debts contracted after the security is granted, at least to the extent of allowing retention of the security for the amount of the advance. For the security cannot, with reference to such a debt, be considered as granted on account of a *prior* debt; and though it should not have been granted in contemplation of this future debt, yet the creditor, being in possession, will be entitled to exercise retention over it. This was found in a case³, where a person who had an account-current with another

¹ Campbell v. Graham, *antea*, 690, note 1.

² The doctrine is implied, for instance, in Johnston v. Home, 29th Jan. 1751, Morr. 1130; but, indeed, it is nowhere disputed. As to the application of the doctrine to heritable securities, *vide* the case of Cormack, 8th July 1829, 7 S. and D. 868; and as to sales, Cranstoun, 2d Feb. 1830, 8 S. D. B. 425, affirmed 6th July 1832, 1 W. and C. 79.

³ Robertson v. Ogilvie, 21st Nov. 1798, Morr. App. to Bill, No. 8.

having remitted to him, within sixty days of his sequestration, an indorsed bill, which was placed to the credit of his account, the Court, while they reduced the indorsation, so far as it applied to prior debts, allowed retention for an advance of £.200, made after the indorsation, to which they held the statute inapplicable.

4. One form of a *novum debitum* exists, when a debtor, on getting a person to join him as cautioner for an old debt, grants him a security in relief. The cautionary obligation forms here a *novum debitum* as to the cautioner, and affords a consideration for the security, which will render it effectual to him when he has given his obligation *bona fide*, without any view to aid the schemes of the bankrupt, or the original creditor. But, if the cautionary obligation and relative security are proved to be merely parts of one scheme by the cautioner, bankrupt and creditor, to evade the act 1696, and secure the creditor, the Court will then hold the transaction, notwithstanding its disguise, to be merely a security for the prior debt. But, in that case, the different parts of the transaction, being considerations for each other, must be all equally challengeable. There have been several cases of this kind. Thus¹, where a debtor who owed a certain sum paid part of it in cash, and afterwards borrowed £.2000 from a third party on the security of his creditor as cautioner, the creditor receiving at the same time an heritable bond of relief from the debtor for the full sum borrowed, and paying out of it the balance of his debt, the Court justly considered this as an indirect mode of giving the creditor security for his debt by the heritable bond of relief, and therefore set aside that bond under the act 1696, to the extent of the prior debt. In so far as regarded that part of the loan which went to the principal debtor, it was valid, as granted for a new debt; but, as to the old debt, it was a scheme between the debtor and creditor to defeat the act 1696.

In another case², where a debtor's son had accepted a bill drawn by his father, that it might be substituted for two drafts

¹ Grant v. Grant, Summer Session 1788, 2 Bell, 227, note 1.

² Miller v. Duncan and Low, 11th Dec. 1822, and 8th Dec. 1825, 2 S. and D. 77, F. C., and 4 S. and D. 283.

which the father had discounted with a bank, but which had been dishonoured, and, at the same time, received from his father an heritable security in relief of his acceptance, the Court, regarding all these transactions as parts of one scheme by the parties to create an undue preference, reduced the bill and heritable security, in actions brought for that purpose by the bankrupt's trustee. But the bank, having taken the son's acceptance, in place of the dishonoured drafts, which they gave up, and having no concern with that part of the transaction which took place between the son and the father, it was decided, that the reduction by the trustee for the father's creditors, under the act 1696, could not affect their right to the son's acceptance, and that they were entitled to exact payment of it from him ¹. In another case ², where a person under diligence for certain bills due to a banking house, offered to them as a security a vendition to a ship, which they refused, and then prevailed on a third party to interpose his credit with the bankers, by indorsing a promissory-note to them, on which the vendition was executed in this party's favour, the debtor having become bankrupt within three weeks afterwards, the Lord Ordinary, in an action by the trustee for his creditors, reduced both the promissory-note to the bankers, and the vendition to the cautioner, as falling under the act 1696, and the cautioner acquiesced. But the Court altered the judgment as to the promissory-note, holding it effectual against the cautioner, although the vendition to him was set aside, and though an offer was made to prove that the bargain between him and the debtor had been concluded with the knowledge of the agent for the bankers in the transaction. The validity of the vendition was not indeed tried before the Court; but it is said, that the Court would also have set it aside, and they are reported to have considered it bad in two subsequent cases ³. It may be doubted, however, whether the promissory-note could be sustained if the vendition was reduced. Neither of them fell under the strict terms of the

¹ *Low v. Duncan*, 12th June 1827, 2 W. S. 579, and 583, the House of Lords reversing the judgment of the Court of Session.

² *Swinton's Trustee v. Sir William Forbes and Company*, 19th Feb. 1790, *Morr.* 1181. *Vide* also the report of the case by Mr Bell, ii. 227, note 1.

³ 2 Bell, 227, text, and note 1.

act 1696, since the note was a security granted to the creditor, not by the debtor, but by a third party, and the vendition was a security granted to a third party, not to the creditor. Neither of them could be challenged, unless as forming parts of a scheme to evade the act 1696, by granting, under a false name, what was really a security to the creditor. But this ground of challenge applied equally to the promissory-note and to the vendition, and, therefore, if the bankers, through their agent, were privy to the scheme, the note seems to have been reducible as well as the vendition.

In a later case¹, where a debtor, threatened with personal diligence by his creditor, had, on condition of the creditor superseding diligence, granted him one bond of corroboration for the debt signed by his brother and partner, and another signed by his two brothers-in-law, whereupon the debtor gave his brothers-in-law an heritable bond of relief, (which referred to their cautionary obligation,) for part of the amount, over his house, the Court, holding, notwithstanding certain objections which need not be detailed at present, that the bond of corroboration and bond of relief were parts of the same transaction, sustained the bond of relief against a reduction by the creditors. It was held by the majority of the Court, that the parties had no suspicion of the debtor's approaching bankruptcy, and intended no evasion of the statute; and the bond of relief was considered as not falling under the statute, being granted for a *novum debitum* as to the cautioners. The minority, on the other hand, seem to have considered the act as applicable, on the ground of a constructive accession by the cautioners to the scheme of rendering their obligation the means of giving a security to a prior creditor. But the statute was not applicable unless there had been proof of their accession.

II. Date of the deeds challengeable.

The rule of the act 1696, regarding the date of such deeds as fall under it, including those which relate to bills and notes, is, that they shall be "made and granted" within sixty

¹ *Monteath's Trustee v. Douglas and others*, 12th Dec. 1794, *Morr.* 1146. *Mr Bell*, ii. 227, note 2, gives a fuller detail of the opinions of the Court in this case than is given in the printed report.

days of the granter's bankruptcy. It has been already considered what constitutes bankruptcy, and from what date it is to be computed¹. It remains to be considered, 1st, How the sixty days are to be reckoned back from the bankruptcy to the date of the deed challenged? and, 2dly, When the deed is held to be completed?

1. In reckoning the sixty days, 1st, It is settled by a judgment of the House of Lords, in an analogous case regarding the computation of sixty days, within which a deed on death-bed affecting heritage is challengeable², that this period must be reckoned exclusive of the day of death or bankruptcy; 2dly, The days do not run from noon to noon, but from midnight to midnight, viz. from the midnight immediately preceding the bankruptcy to the sixtieth midnight previous³; 3dly, A deed executed on any part of the sixtieth day is held to be beyond the sixty days, on the principle, *Dies inceptus pro completo habetur*. This was held⁴, regarding the indorsation of a bill which had been made on 31st March, the debtor, as was alleged, having been rendered bankrupt on 30th May following. The Court, besides finding that the bankruptcy had not taken place, held that the indorsation would, at any rate, have been valid, as being granted on the sixtieth free day before the alleged bankruptcy. The same rule was adopted⁵ regarding the preference of an arrestment used on the sixtieth free day before the date of a bankrupt's sequestration.

2. Time when the deed is "made and granted" in terms of the act.

The act provides, with regard to "dispositions, heritable bonds, or other heritable rights whereupon infestment may follow," that they "shall only be reckoned, as to this case of bankrupt, to be of the date of the sasine lawfully taken thereon." It is a question⁶ whether this clause applies to dispositions of lands by a debtor who is not himself infest, or

¹ *Antea*, 665-6.

² Sir John Ogilvie v. Mercer, 10th Dec. 1793, Morr. 3336.

³ 2 Bell, 179, note 4, and cases therein cited.

⁴ Blaikie v. Clegg, 21st Jan. 1809, F. C.

⁵ Anderson v. Starkie, Fletcher and Company, 2d March 1813, F. C.

⁶ 2 Bell, 229-30, and cases there stated. It would appear, that, by the latest case, it has been decided that this clause of the act applies only to conveyances by a party who is himself infest.

merely to dispositions of lands by a party infest, as being the only "rights whereupon infestment may follow," so that thus the sixty days as to all other heritable rights may run from their date. But, at all events, the clause has been altered so far by the last bankrupt statute¹, as to make the date of recording the sasine, and not the date of the sasine, the term to which the currency of the sixty days refers, in the class of cases which are included in it. As to assignments, it was doubted whether the date of them should be reckoned from their execution, or from their intimation to the debtor. On the one hand, it was maintained, that, independently of the analogy arising from the enactment regarding the date of heritable rights, the date of assignments must be computed from the time when they became effectual, which was only from their intimation. On the other hand, such assignments were not included in the enactment regarding heritable rights; and it was pleaded, that, though their intimation formed the criterion of their efficacy in competition with other rights, this was no reason for holding such intimation to be synonymous with the date of granting them, which was a different act, depending on the debtor, seeing even the provision, as contained in the act 1696, regarding the date of heritable rights, made it depend, not on registration, which alone could render the right effectual, but on the date of the sasine following on it. In conformity with this reasoning, it was decided², that an assignment of a personal right, in security of prior debts, being granted more than sixty days before the granter's bankruptcy, did not fall under the act 1696, although it was not intimated till within the sixty days. But the law has been altered by the last bankrupt statute³, which enacts, "that, "in all questions upon the said statutes," (viz. the act 1696 and the present act,) "all dispositions, assignments and venditions, which do not require sasine, but to which intimation "or delivery are requisite, in order to render them complete "as transferences or as securities, shall be reckoned to be of "the date of the intimation, delivery, or other act requisite

¹ 54 G. III, c. 137, § 12.

² *Hay v. Sinclair and Co.* 8th July 1788, *Morr.* 1194.

³ 54 G. III. c. 137, § 13.

“for completing the same, without prejudice to their validity
“in other respects.”

According to this enactment, drafts by the debtor, in security of a prior debt, considered as assignments of the funds in the drawee's hands, must be reckoned as of the date of intimation to him; that is, of presentment, as proved by acceptance, or, in case of non-acceptance, by protest, or other habile evidence¹, since it is from that date that they become effectual as assignments. If such drafts are accepted, but the acceptance bears no precise date, it will, in general, be presumed to be of the same date with the draft², though such a presumption may, in questions under the act 1696, be redargued by contrary evidence. Indorsations of accepted bills, or of unaccepted drafts duly presented, require no separate intimation to the drawee, but form effectual assignments³ of the drawer's funds in the drawee's hands, in the first of these cases, when made at any time after the date of acceptance, and in the latter case, when made after the date of presentment. But they are not effectual till delivery of the bill⁴, and, therefore, in terms of the clause now quoted, the date of delivery, if ascertained, will be held to be their true date. When there is no separate evidence of the date of delivery, the date of indorsation, as appearing on the bill, unless disproved, will be held to be its true date, as an assignment of the funds in the drawee's hands. This rule applies also to blank indorsations. In both cases, delivery of the bill will be presumed, unless the contrary is proved, to have been of the date of the indorsation⁵. If the indorsation has no separate date, it will be presumed to be that of drawing the bill⁶; and, unless the bill is proved to have been indorsed or delivered on a different date, its efficacy as an assignment will, like that of the original draft, be computed from the time of acceptance or presentment.

The enactment now quoted has no reference to the date of drafts, as obligations by the drawer. Such obligations are held, in questions under the act 1696, to be of the date which they bear, unless proved to have been executed or delivered

¹ *Antea*, 66.

⁴ *Antea*, 159.

² *Antea*, 67.

³ *Antea*, 276.

⁵ *Antea*, 175 and 289.

⁶ *Antea*, 67.

on a different date. The same rule is followed as to the date of promissory-notes, when challenged under the act 1696, as securities for prior debts. Acceptances by the debtor, when challenged on the same ground, are presumed to be of the date which they bear, unless proved to have been granted or delivered on a different date; and, if they bear no separate date, they are held, unless the contrary is proved, to be of the date of the bill.

The case already mentioned, viz. of assignments granted, not for prior debts, but for debts contracted at the time, or for a price instantly paid, is not comprehended under the foregoing enactment. It has been shewn, that the act 1696 contained no enactment making the intimation of assignments the criterion of their date in questions under it. The enactment in the last bankrupt statute, which rendered their intimation or delivery the criterion of their dates¹, fixes this criterion only "in all questions upon the said statutes," viz. under the last bankrupt act, and the act 1696; and, as this limitation was also referred to in the act 1696, the insertion of it in the last bankrupt statute, as to assignments, must have reference to the meaning previously given to it as inserted in the act 1696. But it is established, that, in the act 1696, it relates exclusively to securities for prior debts, and not to securities for *nova debita*²; and, therefore, the enactment regarding assignments in the late act, being limited in the same way, must refer only to assignments for prior debts. Hence a draft given in security of a *novum debitum* will be considered, with reference to the act 1696, as an assignment of the funds in the drawee's hands from its date, though it should not be intimated to him by presentment for some time afterwards³, and will not be challengeable as a security for a prior debt, though not completed as an assignment till after the money was advanced. In such a case, as well as in the case of an heritable security for a *novum debitum*, the security will be considered as of the date when the debtor grants it, this being the only act which depends on him.

¹ 54 G. III. c. 137, § 13.

² Johnston v. Home, 29th Jan. 1751, Morr: 1130-6. Kilkerran's Report, which gives the fullest statement of the opinions of the Court, is contained in p. 1135-6.

³ 2 Bell, 223.

There is more difficulty, however, when the security, though contemplated by parties at the time of advancing the money, is not fully executed by the debtor till afterwards.

The most favourable case of this kind for the creditor, is, when a security has been granted at the time of the advance, but, from a change of circumstances, it becomes necessary to substitute a new security, which differs from the first only in form; for instance, if a debtor, after granting a security over lands, was obliged to sell them at a valuation to the commissioners under a road act, and then invested the price on a new security for his creditor. This security would be considered only as a *surrogatum* for the old one; and therefore the date would be held the same. The same rule was adopted¹, where a merchant who had consigned a cargo to another merchant for sale, raised money by drawing bills on the consignee on account of the cargo; but afterwards, as the consignee refused to take the cargo, which was therefore consigned to another person, became obliged to give his creditor new bills on the second consignee. These second bills, though within sixty days of the debtor's bankruptcy, and challenged as granted for a prior debt, since the advance of money was long prior to them, were sustained, as they were evidently *surrogata* for the first bills.

Another case is, where the debtor has got a loan of money on the credit of a bill or note payable to him, and delivered *instantly* to the creditor, but has forgotten to indorse it. In England, it has been shewn, that in such a case, his indorsement of it, even after an act of bankruptcy, will be valid; and that, after a commission of bankruptcy is issued against him, his assignees may be compelled to indorse it². In Scotland, the same rule would probably be enforced against the trustee on his sequestrated estate; or, if the bankrupt himself indorsed the bill or note, the indorsement, though made within sixty days of his bankruptcy, would be sustained; for the advance has been made on the faith of the bill or note being transferred at the time; and, though the indorsement has been omitted through mistake, the debtor's trustee cannot refuse

¹ *More v. Allan*, 23d Jan. 1800. Vide 2 Bell, 223, note 6, where a full detail of the case is given.

² *Antea*, 273.

to correct the mistake, nor can his other creditors set aside the indorsement under the act 1696, if made afterwards by himself, without agreeing to rescind the whole transaction, as vitiated by an *error in essentialibus*, and consequently to refund the money which the creditor advanced on the faith of it. It is a different case where the bill or note has been given merely as a deposit, without an intention of transferring it to the creditor; for, in such a case, the creditor has advanced money on the faith of the deposit alone; and a subsequent indorsement of the bill or note by the debtor would be challengeable as a new security for a prior debt.

But the most difficult case is, where the security is merely stipulated at the time of advancing the money, and is not granted till some time afterwards. The question, whether such a security falls under the act 1696, or is a security for a *novum debitum*, has been hitherto discussed solely with regard to the case of heritable securities. In that case, the decisions of the Court have, at different times, been very contradictory¹. The last decision was favourable to such a security. But it is still difficult to deduce from the decisions fixed rules applicable to all such cases. On the strength of the latest decision, however, it may probably be laid down, 1st, That, if there is an unbroken connection between the advance of money and the granting of the security, so that they can be fairly considered as parts of one transaction; for instance, if the debtor has, at the time of the advance, put his title-deeds into the hands of an agent, with instructions to prepare a security for the loan over a specific subject, the security will be held as granted directly in consideration of the advance, and will therefore be sustained as a security for a *novum debitum*, though the execution of it should be delayed for some time after the advance, and though it should fall within sixty days of the grantor's bankruptcy². The creditor's claim to such

¹ *Vide* on one side, viz. against the validity of such a security, *Eccles v. Merchiston's Creditors*, 4th Feb. 1729, *Morr.* 1128; *Brough's Trustees v. Duncan*, and *Ditto v. Spankie and Jollie*, 5th June 1793, *Morr.* 1160 and 1179; *M'Lean v. Primrose*, 16th Nov. 1799, 2 *Bell*, 225, note 2; and in favour of the security, *Mansfield, Hunter and Co. v. Cairns*, 15th Feb. 1771, *Morr.* App. to Bankrupt, 13; *Houston and Co. v. Stewart*, 20th Feb. 1772, *Morr.* 1170; *Spotiswood v. Robertson Barclay*, 19th Nov. 1783, *Morr.* 1177, and *Bank of Scotland v. Stewart and Ross*, 7th Feb. 1811, *F. C.*

² *Bank of Scotland v. Stewart and Ross*, 713, note 1. This decision, how-

security may not be entitled to compete with a prior infetment, or an adjudication against the subject burdened, and, in the event of the debtor's sequestration, he would have no claim against the trustee for the creditors, to complete the security; since, by advancing the money before it was executed, he trusted in some measure to the debtor's personal credit¹. This consequence, however, would follow, if the security had been granted by the debtor, but not completed by infetment or intimation, although such a security could not be challenged under the act 1696. The only question, in the present case, with reference to a challenge under that act, is, Whether the security was granted for the advance as for a prior debt, or whether it was contemplated, from the time of the advance, both by the bankrupt and the creditor, as the direct consideration for the advance, and was delayed only by accident? In the last of these alternatives, it should be sustained as a security for a *novum debitum*. But, *2dly*, If, notwithstanding that measures have been taken to prepare the security, the creditor allows such a delay to elapse in executing it as breaks the continuity of the two transactions, and shews that the security has ceased to be contemplated, either by the debtor or creditor, as the direct consideration for the loan, it will then probably be regarded, on account of the delay, as merely a security for a prior debt. It is difficult to fix what lapse of time shall have this effect; or whether the mere lapse of time may not be obviated by such circumstances as account for the delay. But, after a considerable time, the security must cease to be regarded as a direct consideration for the loan². *3dly*, If there is merely a general stipulation at the time of the advance to grant "security," the advance must be considered as made on the

ever, is directly contrary to the preceding case of *M'Lean v. Primrose*, in which the decision, under similar circumstances, was against the security. But that case was not ultimately decided on this ground.

¹ This point is implied in the decision in the case of *Mansfield v. Walker's Trustees*, 29th June 1833, 11 S. D. B. 813, affirmed in the House of Lords.

² In the case, however, of *Cormack v. Anderson*, 8th July 1829, 7 S. and D. 868, the Court sustained an heritable bond, granted, in terms of a previous contract, two months after the debt arose, and followed by infetment, at the distance of five years, after the debtor's sequestration, and, in *Cranstoun v. Bontine*, 2d Feb. 1830, (affirmed in 1832,) 8 S. D. B. 425, 1 W. S. 79, effect was given to a disposition granted, and infetment taken, within sixty days of the debtor's bankruptcy, by virtue of missives granted some months previous.

faith of this obligation only, and not in consideration of any specific security, that not being even in contemplation of the parties at the time of the advance. There is one case, where a security granted to a wife within sixty days, in fulfilment of an obligation in her marriage-contract, executed several years before, to infest her in security of her jointure, was sustained as if it had been granted at the date of this obligation¹. But the Court adopted a different doctrine in subsequent cases; and the last decision, though favourable to the creditor's security, does not afford any warrant for sustaining it under such circumstances. It may be even doubted, whether a stipulation, at the time of the advance, to give a security over a specific subject, without any measure taken for its execution, is sufficient to make it *pars ejusdem negotii* with the advance; as it may be held, that the advance was made, not in contemplation of the security as a thing to be immediately done, but on the faith merely of the obligation to execute it. There are no decisions of the Court on this question, since the time when the earlier decisions setting aside all such securities whatever came to be doubted.

The doctrines now laid down have a very limited application to the granting or indorsement of bills or notes in security; because, if they are to be granted as direct considerations for an advance of money, there cannot be the same excuses for delaying the transference of them, as with heritable securities. It may even be doubted, whether any thing less than delivery of the bills or notes at the time of the advance can take the security out of the statute. A general obligation at the time of the advance to grant or procure bills would not be sufficient; because in that case the advance could not be made in contemplation of any particular security, but merely on the faith of the obligation. Perhaps, even an obligation to grant or procure specific bills or notes would not be sufficient; for, as there cannot be the same obstacles to delay the execution of such a security as in the case of an heritable right, the creditor has the less reason to advance money unless in direct exchange for the security; and, therefore, if he does not require it at the time, however specific the obligation to

¹ Spottiswood v. Robertson Barclay, *antea*, 713, note 1.

grant it is, he may be considered as trusting entirely to that obligation ¹.

III. *Process for challenging Deeds which fall under the Act 1696.*

1. *Title to challenge.*—The person challenging must be a creditor of the bankrupt, or in right of a creditor, as a trustee appointed by creditors, or interim factor or trustee on the debtor's sequestrated estate, or even the bankrupt himself after he has concluded a composition-contract with his creditors, since he thereby acquires those rights belonging to the estate which were previously vested in the creditors. One of two acceptors of a bill cannot bring a reduction of a preference granted by the other acceptor, founding on his possession of the bill retired, because it is thus extinguished, and the presumption is, that it was retired by both acceptors. He can have no title, in such a case, without a decree of relief and constitution against the other acceptor ².

The principal question on this subject has been, whether the challenge may be brought by any creditor, or only by those who were creditors before the date of the deed challenged. In the only two cases which have occurred, the Court restricted the right of challenge to prior creditors ³. The act appears to favour this conclusion; for, although it provides generally that a declarator of bankrupt may be brought by "any of his just creditors," yet the only deeds which it declares to be challengeable, are those granted "in favour of his creditors, either for his satisfaction, or farther security, *in preference to other creditors.*" But a deed cannot be said, in correct language, to give one creditor a preference over another creditor, unless both are creditors at the date of the deed. Indeed, the act has been construed to include only preferences to prior creditors; and, therefore, as these are designated generally as creditors, the other creditors to whom

¹ For a full discussion of this difficult subject, *vide* Mr Bell's work, ii. 223-6. The doctrines stated above, in so far as they differ from those laid down by him, which they do in some particulars, are suggested with considerable diffidence.

² *Bett v. Arnott*, 27th June 1828, 6 S. and D. 1021.

³ *Mann v. Walls*, 25th July 1702, *Morr.* 1006; *Robertson Barclay v. Lennox*, 19th Nov. 1783, as reported by Mr Bell, ii. 209, note 2.

they are said to be preferred, being designated in the same way, must be also held to mean prior creditors. These seem, therefore, to be the only creditors who can bring the challenge, as they alone are declared to be injured by the challengeable deed. An opposite construction, however, has been adopted by a learned author¹; and there can be no doubt, for the reasons which he states, that it would be expedient, and conformable with that principle of equality which it is the purpose of the bankrupt law to introduce, to extend the right of challenge to all who were creditors at the time of the debtor's bankruptcy.

2. *Form of the action*.—According to the act, it is necessary first to establish the debtor's bankruptcy by a declarator, and the nullity of the deeds challenged is then made to follow as a consequence from the declarator. But the usual form is to bring a combined action of declarator, reduction and repetition, libelling specially on the statutes, subsuming the bankruptcy and the particulars of the deed challenged, calling for production of it, if in the form of a written deed, under the certification of nullity, and concluding for reduction of it, and for repetition of the fund alienated by means of it². This process, which cannot be brought as an ordinary action, is peculiar to the Court of Session.

A summons to reduce certain indorsations and payments under the acts 1696 and 1621, which did not libel the debtor's bankruptcy or insolvency at the date of the indorsations and payments, or within the period prescribed by the act 1696, or state any facts from which these requisites could be inferred, was dismissed as irrelevant.

3. *Effect of the reduction*.—1. One effect of the reduction is, to set aside any deed falling under the act 1696, so far as the interest of the creditors injured by it is concerned. But it is not therefore null to any other effect. In one case³, where a debtor, after horning had been raised against him by one of his creditors, granted a bill for the supposed amount of all his debts to a trustee for behoof of his whole creditors, who then rendered him bankrupt on this bill, the creditor who

¹ 2 Bell, 206, and 232.

² 2 Bell, 210.

³ Wood v. Dalrymple, 4th Dec. 1823, 2 S. and D. 555.

⁴ Strang v. M'Intosh, 12th May 1821, F. C.

had previously raised diligence succeeded in reducing the bill, as a security granted within sixty days of bankruptcy; and yet the same bill was sustained as a valid ground for the diligence which produced bankruptcy, the Court holding that it was good against the acceptor, though challengeable by the creditor. The mere dependence of a reduction, however probable its grounds, will not form a ground for suspending summary diligence raised against a person who is bound for a bill, by a party holding under the indorsement challenged. For such holder is still *in titulo* of the bill, though he will be accountable for its contents, if recovered by him, on the challenge taking effect¹.

2. Although the title to challenge seems to be confined to those who were creditors prior to the deed challenged, the whole benefit of the challenge would probably be held to accrue to the creditors at large². It has been said³, that, when a bill due to a bankrupt, but compensated by a large debt which the latter owed to the acceptor, is indorsed to a creditor within sixty days of his bankruptcy, the acceptor has an interest to challenge the indorsation, though the creditors at large have none; and, therefore, although, in consequence of a sequestration being awarded, the only formal title to challenge was in the trustee, as acting for the creditors, who had resolved not to challenge, it is stated, that the acceptor might, in this case, demand from the trustee an assignment of his right, or insist in the challenge under his name, on finding security for his relief from expenses. This doctrine appears to be well founded. But whoever has the right of challenge cannot succeed, without restoring the favoured creditor to the benefit of any security or other advantage which he has relinquished in consideration of the right challenged, so far as that benefit has accrued to them. For instance⁴, where a banker, who held six bills against an individual, gave them up on receiving indorsations to three other bills, it was found, on these indorsations being reduced by the trustee on the debtor's sequestered estate, that the banker was entitled to restitution of the bills given up. The creditors are only

¹ *Brown and others v. Campbell and Company*, 11th Feb. 1809, F. C.

² *2 Bell*, 232.

³ *Ibid.* 415, note 3.

⁴ *Blair's Trustees v. Miller and Campbell*, 18th June 1822, 1 S. and B. 301.

entitled to set aside a deed so far as they are injured by it ; and not also to retain the security or benefit which the creditor renounced in consideration of the deed. But they are not likewise bound to procure restitution of any interest which he may have surrendered to a third party for the deed under challenge, that being a transaction with which they have no concern. For instance, if the creditor has, in consequence of the security, renounced an obligation to him for the debt by a third party, the creditors are not bound to restore this obligation, though they should challenge the security. Nor does the liability of the third party revive ; for the discharge of his obligation was absolute ; and the reduction of the security, in consideration of which the creditor discharged it, is a mere casualty, of which the latter must be held to have taken the risk. Thus ¹, where a creditor, who held an acceptance for his claim, signed by his debtor and his debtor's son, gave it up in consequence of getting an heritable security for the debt, which was afterwards set aside under the act 1696, he was found not entitled to insist for redelivery of the acceptance against the son, who pleaded that he did not know of the transaction in consequence of which it was renounced.

3. Farther, if the creditor has given up some security to the debtor, in consideration of the security in question, and the debtor has disposed of it ; for instance, if the creditor has given up a lien on goods, which the debtor has thereafter sold, or redelivered a bill, which the debtor has indorsed away, the creditors, though they succeed in the challenge, are not responsible for these funds, as they have reaped no benefit from them ². They will however be liable to restitution of the goods or bills, if they came into their possession, and are still distinguished from the rest of the estate.

4. Another question is, whether the challenge can nullify a bill or note, or the indorsement to it, when transmitted by the party whose own title in it is challengeable under the act 1696, to an onerous indorsee ? The words of the act are, that all dispositions, assignations or other deeds falling under the description already mentioned, shall " be void and null."

¹ Black v. Cuthbertson, 15th Dec. 1814, F. C.

² 2 Bell, 233. A case of this kind occurred, and was decided according to the views now stated, in *Ritchie v. Wyllie*, 27th Nov. 1821, 1 S. and B. 169.

This nullity, indeed, does not take effect *ipso jure*, but only when the challenge is made by certain persons. But, as soon as they make the challenge, the words of the statute seem to indicate that the nullity is absolute, being as strong against onerous indorsees as the words of the similar enactment already noticed¹, regarding the nullity of bills or notes granted for gaming debts, or as the enactment regarding such documents, granted for usury, was, till the recent statute² in favour of onerous and *bona fide* holders. Whether it is consistent with the negotiability of such documents, that a transaction between the granter or first indorser and his payee or indorsee should affect another indorsee who knew nothing of it, and who gave full value to his indorser, or whether personal grounds of objection should be extended beyond the parties from whose conduct they arise, is a question of expediency which deserves the attention of the Legislature. But the words of the act, if construed literally, seem to create a nullity, which would affect the title, not only of the payee, but of subsequent indorsees. Each holder has a claim against all the indorsers whose indorsements are subsequent to the challengeable deed, because each of them is considered as a new drawer. But, according to the construction now stated, he could have no claim under the bill or note against the bankrupt's estate, whether the bankrupt was drawer, acceptor or indorser of the bill or note; nor, if the bankrupt was drawer or indorser, could he have a claim against the drawee, or any of the parties liable previously to the bankrupt's indorsement, as the bankrupt's subscription, which is his title, either mediately or immediately, would be altogether null. This construction, however, would be very dangerous to the rights of onerous indorsees; and the want of a decision on the point, though it must have often occurred, indicates that the general understanding is inconsistent with it.

¹ *Antea*, 134.

² 58 Geo. III. c. 93.

SECTION II.

When are Bills or Notes vested in the Bankrupt as his own property, and when as agent for another party, and what, in the latter case, is his power or that of his creditors over them ?

1. The first of these questions depends on two circumstances, viz.

1st, On the possibility of separating the bills or notes alleged to have been given in trust from the other property of the person entrusted with them ; and, 2dly, On the question, Whether they were deposited with him only for a special purpose, or whether the full property of them was transferred to him ?

1. When effects are deposited with a third party for a special purpose, they continue the property of the depositor, so long as they can be distinguished from the depositary's other property. This rule is applicable even to money or bank-notes, while in the depositary's possession, and distinguishable from his other property. The delivery of them to any third party will transfer the property, so that it cannot be reclaimed by the owner. But their currency has not come into operation while they remain with the depositary ; and, therefore, the owner's right of property still attaches to them, if they are distinguishable from the holder's other effects¹. Thus, money or bank-notes sent by a carrier, if put up in a separate parcel, would be recoverable by the owner from his bankrupt estate. So, in a case where an Edinburgh bank was employed by a Dundee bank to take up its notes for them from the other Edinburgh banks, which they put up on certain days in sealed parcels to be sent by the first opportunity, entering

¹ This principle, as applicable to money, is fully expounded by Lord Ellenborough, C. J., in *Taylor v. Plumer*, 3 M. and S. 571. The case is well worthy of attentive perusal, as elucidating the whole doctrine of the limitations which the principal's right in property, of whatever kind, entrusted to a factor, imposes on the factor's power of control, and on the title vested in his creditors by his bankruptcy.

the amount, at the same time, in their book, and giving notice by post to the Dundee bank, it was found that the latter bank had a claim to the property of notes of theirs which had been thus parcelled, entered and notified, though they remained in possession of the Edinburgh bank at the time of their bankruptcy¹. In another case², where the country agent of an Edinburgh bank, was in the habit of keeping the money, which he received from the bank to carry on their business, in a strong box to which he and they had separate keys, it was decided, on his bankruptcy, that all the money found in this box belonged to them, although he had been engaged, with their knowledge, in other employments besides that of their agent, particularly in certain trusts; and though the creditors maintained that none of the money in the box could be the same *in specie* which he had got from the bank, and that he should not be allowed to appropriate any part of his general funds, by the mere act of placing it in the box, to one of his employers more than another. But, whether this money was the same coin which had been sent by the bank or not, the circumstance of its being thus placed by him in the bank coffers pointed it out as money which he had realised in the bank's business; nor could his other employers or creditors complain of its being appropriated to the bank by his act, since they knew, that such appropriation of the money, which he drew for the bank, must take place from the nature of his agency, and must thus be held to have relied on his honesty in making the appropriation. The same doctrine is applicable to bills and notes, when entrusted to a person only for a specific purpose, and distinguishable from the rest of his effects.

In another case, viz. where money, bills or other effects entrusted by one person to another are converted into a new form, *e. g.* by being exchanged for money or goods, certain

¹ Bertram, Gardner and Co.'s Trustee v. The Dundee Bank, 18th Jan. 1797, 1 Bell, 260, note 2.

² Gilchrist v. Christie's Trustee, 4th July 1809, 1 Bell, 264, note 3. *Vide* also Tooke v. Hollingsworth, 5 T. R. 215, where money which had been given *in specie* for a particular purpose, and remained, at the bankruptcy of the person entrusted with it, distinct from his other property, was held to be reclaimable from his assignees by the original owner.

distinctions must be observed, in considering whether the substituted funds become the property of the owner of the original funds. 1st, If the substituted effects are distinguishable from the holder's other property, and are clearly traced as the proceeds of the original bills or effects, and if the factor has not diverted them from the destination of these effects, the one will remain the constituent's property, as much as the other. For instance, in an English case¹, where a factor sold certain goods which were consigned to him, and took notes for the price, it was decided by the Court of Common Pleas that these notes, being distinguishable from the holder's other property, and coming in place of the goods, belonged to the consigner of the goods. The same doctrine was followed in Scotland in an early case², where a factor, employed to sell certain goods for another, having taken a bond for the price in his own name, it was decided, on his death, that the price was not *in bonis* of him, but that the owner of the goods was entitled to recover it, as coming in place of the goods, directly from the purchaser. In this case, however, *first*, the question was not with the factor's creditors, but with his next of kin and with the purchaser; and, *secondly*, there was written evidence of the factor having taken the bond for his constituent's behoof, though apparently in his own name.

In another case³, an executor having appointed a factor by his own authority, and taken from him a bill for the realised proceeds of the executry, payable to himself or order, which he deposited with a third party, on a receipt bearing that it was to be applied in payment of the claims against him as executor, his constituent's nearest of kin were found entitled, in preference to his creditors, to the proceeds of the bill, as

¹ *Scott v. Surman*, Willes, 400, referred to as an anonymous case by Lord Chancellor Hardwicke in *Dumas ex parte*, 1 Atk. 234. In this case, Willes, C. J., who delivered the judgment of the Court, places the distinction between money and notes, with reference to the matter in question, entirely upon this, that money entrusted to a person, even for a special purpose, could not, in general, be distinguished from his other funds. The converse of this doctrine is, that, if it could be distinguished, the property even of it would still remain with the original owner.

² *Street v. Home and Burntsfield*, 9th June 1669, Morr. 15122.

³ *Baird v. Murray's Creditors*, 4th Jan. 1744, Morr. 7737 and 15130.

forming part of the executry. Certain cash which he likewise deposited with this third party did not appear to be considered in the same light, as it was merely given to the depositary to meet any claims which might be made against him as executor. But the bill being clearly traced to arise from the executry, and he having appropriated it to executry purposes, the next of kin were preferred to it even against creditors. In another case ¹, where an executor's factor, after realising the proceeds of the executry, lodged them in a bank on receipts in his own name, but the money thus lodged was designated as part of the executry, by a note holograph of him, found in his repositories at his death, the executor was found entitled to the money, in preference to a claim of compensation by the bankers on a debt due to them by the factor. In this case, it may be doubted whether the bankers were not entitled to rely on the fund as belonging to the factor, and retain it for their claim against him, unless they knew that it belonged to the executry ². But this remark does not apply as to the factor's other creditors or representatives, with reference to whom the doctrine of *surrogatum* is strictly applicable.

2. The same result follows, though bills or money remitted to an agent for a special purpose should be confounded for a time with his other funds, if the agent ultimately sets them apart for their original purpose, his act in thus setting them apart again to his constituent's use, rendering them as completely his as if they had always continued distinct from other funds. This doctrine was fully brought out in the following English case ³. A paymaster of the forces having remitted bills to a London house, with previous orders to purchase a certain kind of foreign coin with the proceeds, and send it out to him, the London house raised money on the bills by discounting them, and then sent the proceeds to a house in Lisbon, with directions to procure the coin there, but, if they could not do so, to send back good bills for the amount. The Lisbon house, as they could not procure the

¹ *Alison v. Fairholme*, Nev. 1765, Morr. 15132.

² *Vide* Mr Bell's remarks on this case, ii. 131, note 5.

³ *Ex parte Sayers*, 5 Vesey jun. 169.

coin, sent back bills, and the London house having, in the mean time, become bankrupt, the remitter of the original bills was found entitled, by the Lord Chancellor, to these new bills, in a competition with the assignees of the London house. The leading principle of the decision is comprised in these words of his Lordship, that, if the sum first remitted "got into the general fund, it got out again," and that "it acquires an identity and a distinction from all the rest of the fund by the application of it, by sending it to Portugal." It was assumed, that, if the coin had been purchased, the original remitter might have seized it, "as purchased by his order with money remitted by him for that purpose;" and it was held that these bills were as much distinguished from the general fund, and marked out for his property, as the coin would have been if it had been purchased. It was therefore held that the remitter might himself have stopped the transaction at Lisbon, and taken the bills, or laid hold of them as his after they reached London. It was doubted whether money thus sent out for the purchase could have been claimed, though, perhaps, it might also have been considered as separated from the other funds. But it was held that the bills were completely set apart as the remitter's property, and therefore belonged to him.

3. It does not make any difference, although a factor, after receiving money or notes for a special purpose, should convert them into a new form for a distinct purpose of his own. The substituted effects will be considered notwithstanding as the constituent's property, as they form merely a *surrogatum* for the original money or bills. This doctrine was expounded in an English case¹, where a gentleman having sold out of the funds by advice of his stockbroker, and given the latter a draft on his bankers for the proceeds, that he might vest them in Exchequer bills; but the broker having vested a great part of them in American stock, and in bullion, to carry them off to America, this question occurred, whether the property of these effects vested in the broker, so as to go to his assignees under a commission of bankruptcy, or remained with his constituent? The Court of King's Bench, after a full argu-

¹ Taylor v. Plumer, 3 M. and S. 562.

ment on a special verdict, decided in favour of the constituent. The ground of decision appears to have been, that, if the original effects still remained the constituent's property, his right of property was not vacated by their transmutation into a new form, but followed them in that state, whether the change had been made in pursuance of the constituent's instructions, or in contravention of them¹. One result of this doctrine is, that, if a factor employed money or bills entrusted to him for a certain purpose, in buying bills or notes in his own name, and these remained in his possession unnegotiated at his bankruptcy, while there was still an unbroken connection between them and the constituent's effects with which they had been acquired, the latter would be entitled to reclaim them as his property.

4. But, when the constituent entrusts the factor with money to buy goods or procure bills for him, which the factor purchases in his own name, then, unless the money has been set apart from the factor's other property, the constituent's right in it resolves into a mere personal claim for repayment. It cannot revive, till the factor again sets it apart for the constituent's use, as, in a case already cited², where money was remitted to Portugal for the purpose pointed out by the constituent. But, in the case now supposed, it is laid down³, that the effects so purchased remain his property, subject to a personal obligation to convey them to his constituent. In one case⁴, where a party who had got money from another to purchase goods for him, bought them in his own name, though he appeared to have designed them for his constituent's behoof, the Court decided that the right to them was still in the factor, and that, consequently, they were attachable for a debt due by him. The same doctrine would apply to bills or notes, though they remained with him unnegotiated

¹ Lord Ellenborough, C. J., who delivered the judgment of the Court, gives a full exposition of the whole law, and of all the authorities on the subject; and distinctly lays it down, even with reference to money, that the property of it does not pass from the original owner, unless when it is so confounded with the mass of the factor's other property, that it can no longer be traced or identified.

² *Ex parte Sayers*, 724, note 3.

³ *Stair*, i. 12. 16; *Erskine*, tit. 8. 34; 1 *Bell*, 268, note 1.

⁴ *Boylstoun v. Robertson and Fleming*, 24th Jan. 1672, *Morr.* 15125.

at his bankruptcy. It has been suggested, however¹, that if a factor, after thus purchasing goods, intimates to his principal that they are bought for his behoof, and that they are lying subject to his disposal, the property will be vested in him. The same doctrine would probably apply to bills or notes thus purchased, if they remained with the factor, though taken in his name; because, agreeably to a case already referred to², they are marked out as the constituent's property, by being set apart for the purpose which he had appointed. The constituent, indeed, could not have reclaimed them from onerous holders, because the factor retained the power of conveying them away, by taking them in his own name. But there was such an appropriation as entitled him to reclaim them from the factor himself, or from his general creditors.

Independently, however, of these cases, which depend on the possibility of distinguishing effects or bills deposited from the factor's property, there is another question, viz.

2dly, Whether the principal has merely deposited them with the factor for a special purpose, subject to his right of property, or has transferred the property, trusting to the factor personally for the proper exercise of the powers conferred on him?

That the principal may retain the property, he must indicate clearly that the bills, &c. are merely deposited for a special purpose. If a person commissions goods from another who is not his factor, and sends him bills for the price as soon as he gets the invoice, he will not be entitled to recover the bills, though the other party should fail with the goods in his hands, since he has parted with the property of the bills, and trusted to the seller's credit for the fulfilment of his part of the contract³. But, if a person remits bills to another, that he may purchase goods for him with the proceeds, but is himself obliged to pay the price from his factor's failure to do so, he may reclaim the bills, as being still his property, seeing they were remitted only for a special purpose, and are distinguishable from the factor's other property⁴. The principles already laid down lead to this conclusion, which is also illustrated by various cases, to be immediately noticed, where

¹ 1 Bell, 268.

² 1 Bell, 261.

³ *Ex parte Sayers*, 724, note 3.

⁴ *Ibid.*

bills are remitted by the principal solely to cover acceptances by the factor for his behoof, but which the principal is obliged to retire ¹, or where they are deposited without indorsation, in security merely of past advances ². But this leads us to consider the doctrine now stated, in the case in which it is most frequently applied, viz. that of bills or notes remitted to bankers.

In this case, several distinctions must be observed.

1. When the banker discounts bills or notes, he is in some sense the purchaser of them, and they become thenceforward his property ³. It will make no difference, although the banker, after discounting a bill, should, instead of paying its amount to his customer, place it, after deduction of discount, to the credit of his account. For, from the moment of discount, the banker takes all risks of the bill being stolen or destroyed, and the discounter has an absolute right to draw for its amount, under deduction of the discount ⁴. But, 2. The property of bills or notes is not transferred, when they are merely remitted to a banker, or any other person, for a special purpose, *e.g.* to recover payment of them, or to answer other bills when due. In that case, the banker's right, in a question between him and the remitter, is limited by the condition on which the bills were remitted. If they are indorsed to the banker specially, or are transferable by mere delivery, from being blank indorsed, or made payable to the bearer, the banker may have thus a title to them absolute in form, such as would make them transferable to a third party. But, while he retains them, his right, as it depends on the whole transaction, by virtue of which they were transferred to him, must be limited by the condition of transference, and his creditors succeeding him by diligence, or in consequence of his bankruptcy, to the right as it stood in his person, must take

¹ *Vide* on this subject, *Tooke v. Hollingsworth*, 5 T. R. 215.

² *Britten ex parte*, 3 D. and Ch. 35.

³ *Per* Lord Ellenborough in *Giles v. Perkins*, 9 East. 14; *vide* also *Carstairs v. Bates*, note 4.

⁴ The circumstances and the decision, as well as the ground of judgment, were as stated in the text, in *Carstairs v. Bates*, 3 Campb. 301, *per* Lord Ellenborough. His Lordship referred to the doctrine which he had laid down in the preceding case of *Giles v. Perkins*, that a banker discounting a bill was the purchaser of it.

it under this condition. Thus ¹, where a bill had been remitted for the purpose of applying the proceeds in payment of another bill, the remitter, who had been obliged to take up the last bill was found entitled to get back the proceeds of the other bill, from the assignees of the party to whom it was sent. The same doctrine has been established regarding bills sent to meet the remitter's acceptances, or bills accepted by the banker for his accommodation. Thus ², where certain bills and notes were remitted specially to meet bills accepted by another party for the remitter's behoof, these bills and notes, on the death of the person to whom they were sent, were found not to form part of his general funds, but to be applicable to the payment of those particular bills. Again ³, where a banker had accepted bills drawn on him by a customer, under an agreement by the latter to make remittances for answering them when due, and the customer was himself obliged to retire them, from the acceptor's bankruptcy, it was decided that the proceeds of the bills remitted by him to answer the acceptances belonged to him, under deduction of the cash balance due by him in account with the banker. The latter was held to have merely a lien on these bills, first, for the balance due to him, and, secondly, to indemnify him against the acceptances. In another case ⁴, where two parties agreed that the one should purchase for the other all the light guineas which he could get, and that he should be entitled to hold these, as well as any other value remitted to him, to meet bills drawn on him by the other party; but these bills, though accepted, were not paid by him, in consequence of his bankruptcy, so that the drawer was obliged to pay them, it was decided, first by the Court of King's Bench, and afterwards

¹ *Ex parte Peyron*, 2 Rose's B. C. 366.

² *Hassall v. Smithers*, 12 Vcs. 119.

³ *Zink v. Walker*, 2 Sir W. Blackst. 1154.

⁴ *Tooke v. Hollingsworth*, 5 T. R. 215, 2 H. Bl. 501. In *ex parte Sollers*, 18 Vesey, 229, where a bill had been sent to a banker indorsed to recover payment, and his assignees received payment after his bankruptcy, they were ordered to refund the money to the remitter. It was held in the same case, that, though the bankrupt had, by not asking payment from the acceptor when the bill became due, taken the whole risk of it from the remitter, if it should not be paid, this did not interfere with the remitter's right to reclaim the amount, if it should be paid.

by the Exchequer Chamber, on a writ of error, that the latter was entitled to get up the gold, which remained distinguishable from the other effects, as well as certain bills which he had remitted to answer the acceptances, from the other party's assignees.

Where¹ a bill had been sent by a person to his bankers, for the special purpose of meeting his acceptances payable at their house, he was found entitled, on paying those acceptances, to have back this bill from their assignees. It was held in this case, that, if the purpose of sending bills is expressed, no entry by bankers in their books can extend their right beyond it. On the same principle, in a case² where bankers, with whom a bill was deposited by the payees in security of advances made to them, had sent it back to the payees to recover payment, and it was found unpaid among their effects on their bankruptcy, it was held that the bankers had not, by sending the bill for this special purpose, renounced their lien over it, but were entitled to have it back from the assignees. Indeed, it is assumed, in all the cases to be afterwards noticed, that an appropriation of bills to a certain purpose always limits the depositary's right in them.

3. When bills or notes are sent to a banker without special instructions, it will be presumed, from his occupation as a banker, that he gets them merely as a factor to recover payment, and the property of them will remain with his principal. Thus³, where a party who had an account with a banker, sent him certain bills, without precise instructions respecting them, and the banker failed, while he owed this customer a balance independently of the bills, the latter was found entitled to get back the bills from the banker's assignees, as it was held that he had placed them in the banker's hands merely to recover payment. The same decision was given under similar circumstances in another case⁴, where it was held that the circumstance of bills being entered generally in the banker's books, and not written short, (which means enter-

¹ *Ex parte Aitken*, 2 Madd. 192.

² *Bruce v. Hurley*, 1 Stark. 24.

³ *Giles v. Perkins and others*, 9 East. 12, per Lord Ellenborough, who delivered the judgment of the Court of King's Bench.

⁴ *Ex parte Sargeant*, 1 Rose, 153.

ing them in an inner column, and not carrying them out, or including them in the account between the parties till they are paid,) did not transfer the property from the customer, unless his concurrence in this mode of entering them was proved, or might be inferred from the course of dealing betwixt the parties. In another case¹, it was held that the banker must be presumed to have got the bills only as a factor, unless he proves the contrary; and, afterwards², it was decided, on the authority of this case, that such bills, though credited to the customer in the cash-account, and interest allowed on them when paid; while, till then, the customer was debited with interest on them, were not the banker's property, and that, on his bankruptcy, the customer, when the balance of accounts was in his favour, might claim indemnity for them, from correspondents to whom the banker had transferred them on his own account, to the extent of the surplus remaining in their hands, from certain securities deposited with them, after their lien over these securities, for the balance due to them, was satisfied. It will not obviate such a presumption that the banker has entered the bills in his books as cash, unless the customer has been allowed a credit for them, and has drawn on it. He cannot otherwise be bound by entries to which he is no party³. But, 4. When bills sent to a banker are entered short in his books, such an entry forms the best evidence that the banker has got them

¹ Thomson v. Giles, 2 B. and Cr. 422.

² Armistead *ex parte*, 2 Gl. and Jam. 371.

³ No regard was paid to such entries in *Giles v. Perkins*, 731, note 3, or in *ex parte Aitken*, 733, note 1. In *ex parte Sargeant*, 1 Rose, 153, where a party having an account with a banker, on which there was a balance in his favour at the time of the latter's bankruptcy, demanded certain bills not due at the bankruptcy, which had been remitted by him to the bankers without any special instructions, and had been entered in their books as cash, Lord Chancellor Eldon held that this last circumstance could not affect his claim to them, unless the entry had been made with his concurrence, or unless the course of dealing between the parties indicated that they were regarded as cash, as where the remitter drew, or became entitled to draw on the credit of them. Such an entry of bills remitted was also disregarded, when made without the customer's privity, in *Thomson v. Giles*, note 1. In this case, too, the mere circumstance of a customer being entitled to draw on the credit of deposited bills, was not held sufficient to shew that they were transferred to the holder, it being proved by other circumstances that they were not discounted.

merely as an agent to recover payment, subject to a lien for his indemnity against his own acceptance¹.

5. The case where the remitter has a current account with the banker admits of several distinctions. A remittance of bills, not for any specified purpose, but to the general account, will render the bills the banker's property². But if one bill is sent expressly to retire another, this is a specific appropriation, which will prevent the banker from acquiring the property of it³. In another case⁴, where two parties were in the habit of drawing and redrawing on each other, and kept separate accounts, and one of them drew bills on the other, which he desired to be entered in a particular account, and promised to make remittances to answer, and thereafter remitted bills nearly for the amount of the acceptances, which the receivers promised to enter to the same account, and did so, it was decided that there was a specific appropriation of these bills, and that, on the receiver's bankruptcy, the remitters were entitled to have back such of them as remained un-negotiated in the hands of his assignees. These bills were

¹ *Vide* the Lord Chancellor's opinion in *ex parte* Sargeant, 730, note 4; in *ex parte* Rowton, 17 Ves. 431; in *ex parte* Waring, 19 Ves. 345; and in *Perfect ex parte*, 1 Mont. B. C. 25. *Vide* also *ex parte* The Burton Bank, 2 Rose, 162-3, and *ex parte* Harford, *id.* 163, where all such bills entered short were ordered to be given up, on the remitter indemnifying the bankers against their acceptances for the remitter's behoof. The authority of *ex parte* Waring on this subject was also recognised by the Vice-Chancellor in *ex parte* Parr, Bucks, B. C. 191, though the case, which depended on a number of specialties, was not finally decided. It was held in that case, that, after bankers had recovered enough of cash on part of the short bills deposited with them, to meet their own acceptances, their assignees could not retain the residue of the short bills against the depositor.

² This was held, under similar circumstances to those now stated, in *Bent v. Puller*, 5 T. R. 494, where a party having a current-account with a banking-house, consisting on one side of drafts accepted by them for him, and on the other of remittances sent by him to meet those drafts, on which there was a balance against him; and having remitted bills generally to this account, it was held by the Court of King's Bench, that, as there was no specific appropriation of these bills, they must be considered as transferred to the banker on the general account, and could not be reclaimed by the remitter, though he had been obliged, in consequence of the banker's failure, to retire the bills accepted for him by them. *Vide* to the same effect *ex parte* Flournois, cited in *ex parte* Oursell, Ambler, 297.

³ This doctrine is laid down by Lord Kenyon and Buller, J., in *Bent v. Puller*, 801, note 2.

⁴ *Ex parte* Dumas, 1 Atk. 232, 2 Ves. 582.

assimilated to goods consigned, but remaining unsold at the time of bankruptcy. In a case¹, arising out of the same bankruptcy, where a party who had been in the practice of drawing and redrawing with another party, and had drawn bills on this party, which were accepted, remitted two bills, not on account of the sum due by him to them, since he was their creditor in the general account, but to answer what remained for them to pay on his account, this was held to be an appropriation of the bills to their acceptances for his behoof; and therefore, as these were not paid, from the bankruptcy of the acceptors, he was found entitled to recover back the bills from their assignees. In a case², where certain bills, sent indorsed to bankers by a customer, were credited to him for their full amount, without deducting discount, and he was allowed to draw for their amount, provided he either indorsed them, or gave the bankers a guarantee for payment; but he was also charged, in the banker's account, with interest on all cash-payments to him from the time of making them, and on payments in bills from the time when the bills were paid, and credited in the same way with payments made by him in cash or bills, it was held that the bills above mentioned were not discounted or bought by the banker, and that therefore the depositor, on the cash balance, independently of them, being in his favour, might reclaim them from the banker's assignees. The charging of interest against him on bills and cash paid for him, and the allowing him interest on cash and on the bills remitted by him, excluded the idea of the banker's having discounted the bills remitted by him. The same doctrine was laid down in another case, to be afterwards noticed³. It was not held to make any difference on this claim, that the banker had been in the habit of circulating such bills without the customer's knowledge. It seems to follow *a fortiori*, that such bills cannot be held as discounted, or otherwise transferred to the banker, when the customer is only allowed to draw for part of their amount.

6. When a person deposits with a banker bills at long dates, and receives from him bills at shorter dates on the security of

¹ *Ex parte Oursell*, Ambl. 297.

² *Thomson v. Giles*, 2 B. and Cr. 422.

³ *Ex parte Pease*, 19 Ves. 25, *et seq.*

them, the long-dated bills are the remitter's property, and he may reclaim them from the banker's assignees, if he restores the short bills, or makes payment of them. Thus¹, a party having deposited long-dated bills with bankers, on condition of being allowed to draw for a certain sum, (after deducting commission, &c.) at two or three months without renewal, which he did, and the bankers having accepted his drafts, but failing before their acceptances became due, so that they came back upon him, he was found entitled, on giving them up to the banker's assignees, to have back the bills deposited by him, as they had not been discounted, but merely implicated in security of the drafts. On the other hand², where a person had an account with a bank in Liverpool, on the credit-side of which were entered all cash paid or bills deposited by him with them, and on the debit-side all cash paid to him, or bills paid on his account, some of which bills were made payable at a house in London, consisting of two partners of the Liverpool house, and he proposed to the Liverpool house that they should procure his bills to be paid by the London house, as they fell due, and gave the former house bills blank indorsed to provide for such payment, some of which bills they negotiated, and sent others to the London house, (entering them to his credit in their own books, while the London house entered them to their credit in its books,) it was decided by the Court of Common Pleas, on the bankruptcy of both houses, that there was no specific appropriation of these bills to the payment of the depositor's bills, but that he had transferred his right in them to the Liverpool house on his general account, trusting to them to apply them, at their discretion, in meeting his bills, which they had done, by sending them to the London house on their own general account. He was therefore found not entitled to get back any of these bills from the assignees of the London house, though that house had not provided for payment of the first bills, so that he was obliged to pay them himself. No appropriation of the bills was here either expressed or implied: they were paid in to the Liverpool house, not as factors to recover pay-

¹ *Parke v. Eliason*, 1 East. 544. The general doctrine stated in the text was also laid down by the Lord Chancellor in *ex parte Twogood*, 19 Ves. 232.

² *Bolton v. Fuller and others*, 1 Bos. and Pull. 539.

ment, but with full powers to convert them into cash, or otherwise use them to provide for the other bills. There are other cases where the question has been, whether bills remitted by a person to his bankers, to enable them to retire other bills, may be reclaimed by him on providing for these bills? But that question has always turned on this point, Whether there was a special appropriation of the bills to this purpose, or whether the remitter has merely transferred them on his general account, leaving it to his bankers to dispose of them according to their discretion? Several distinctions, applicable to dif-

¹ In *ex parte Pease*, 19 Ves. 25-61, where the question related to the claims of several country banks to have back bills from the assignees of a London bank, (Boldero and Co.) with which they had been deposited, the whole law on this subject was fully and anxiously discussed. It is needless to detail the specialties of the several cases of the different banks. The principal points ruled appear to have been, 1st, That all bills sent to a banker indorsed, may be discounted or pledged, so as to be effectual to the third parties to whom they are thus transferred, (19 Ves. 38, and 49); 2dly, That, when bills are remitted to the general account without appropriation, they are the property of the banker; 3dly, That, when bills are sent with special directions how to apply them, the banker receiving them under these directions, holds them, while in his hands, as the remitter's property, (id. 41-3-6); 4thly, That it makes no difference, though such bills are not entered short in the banker's books, if the entries are not communicated to the remitter; because, in that case, they cannot form evidence against him, though a short entry would have formed good evidence against the banker, (id. 40-1, and 51-2); 5thly, That such accounts, however, are evidence of the transactions between the parties from the time when they are communicated to the remitters, and that, if the latter are charged with interest on all payments made to them, while interest is not allowed them on bills remitted except from the time when they become due, this is evidence that such bills were not discounted, but remained the property of the remitters till they became due, (id. 38-9, 40, 52); 6thly, That a declaration by the bankers that they hold the bills "in reserve and at your disposal" will have the same effect; 7thly, That a permission by the remitters to discount or negotiate certain bills, in order to reduce the cash balance, cannot extend beyond the bills as to which it is given, or transfer the property of other bills remitted to the bankers, (id. 53, 55-6-7); and, 8thly, That, even when such permission is extended generally to all bills remitted, yet, if it was given for a limited purpose, *e. g.* to keep the advances and receipts of cash equal, this purpose limited the permission; or, even when the permission was given for general purposes, yet, if it was not exercised, the right to the bills still remained with the remitters, since the bankers cannot make them their own property in any other way than that pointed out, (id. 60-1.) This last doctrine was held in *ex parte Madison*, mentioned, 1 Rose, 241, where certain bills having been remitted to bankers by a customer, with instructions not to discount them unless his account was overdrawn, and the bankers, instead of discounting them, having charged interest on the sums overdrawn, the bills, which

ferent circumstances in which this question has occurred, are stated in the notes.

We shall now consider,

2dly, What power a banker or factor has over bills or notes entrusted to him either as factor or banker?

If a bill or note, though remitted to a banker or factor for a limited purpose, is indorsed to him absolutely, or is blank indorsed, or made payable to a third party, so as to be transferable by delivery, any party receiving it from him will have a full right to it, though it is transferred in violation of the agreement between him and his constituent. This results from his unlimited title *ex facie* of the document¹. Nor is it every restriction of his right, even *ex facie* of the bill or note, which will render an indorsement or transference by him ineffectual². But, when a bill or note is made payable to him *only*, or to him for the indorser's use, this will prevent him from indorsing it for his own behoof, though not from discounting it, as he may be held to have discounted it on account of his constituent³; or, when it is ordered that the amount of the bill or note should be credited to *the indorser's account*⁴, his power of transference will be restrained, whether he is payee or indorsee.

But, besides, a banker or other factor holding bills or notes, has a lien over them for the balance due to him by his constituent. This lien covers all advances and engagements made or contracted by him under the character in which he receives the bills or notes. For instance, if they are remitted to him in the general character of factor, he may retain them, and, when they are indorsed, may enforce payment of them,

had been entered short, were ordered, on the bankruptcy of the bankers, to be delivered back to the remitters.

In *ex parte* Buchanan, 19 Ves. 201, short bills, (*i. e.* bills entered short,) which had been remitted by the holders to their bankers in London, were ordered, on the bankruptcy of the bankers, to be delivered up by their assignees to the remitters, on the latter allowing a sufficient sum to be retained for answering the bills which the bankers had accepted on their account.

In *ex parte* Clayton, cited 2 Christian's B. L. 167, the same order was made for restitution of certain short bills remitted to bankers, on the remitter paying all the bills which these bankers had accepted on his account.

¹ Collins v. Martin, 1 Bos. and Pull. 651, and *per* Eyre, C. J., in Bolton v. Puller, *id.* 539. *Vide* Chapter on Indorsation, *antea*, 259.

² *Antea*, 260-1.

³ *Antea*, 260.

⁴ *Antea*, 275.

to the extent of all advances made by him under that character; or, if they are remitted to him as banker, whether to be discounted or for any other purpose, they may be thus used in security of advances made or engagements contracted by him for his customer, as banker¹. But bills or notes deposited with him merely as a banker, cannot be retained, or payment of them recovered, for advances made by him generally as factor; nor, when deposited with him as factor, can they be retained for advances made by him in any other character². Farther, his lien does not extend to bills or notes appropriated by the customer (when he remitted them) to a special purpose; as the banker, by taking them under this condition, has excluded any general claim of lien³. If they are deposited in security of a certain specified sum, they cannot be retained as securities, beyond this sum, for his general balance⁴. He himself, too, renounces his lien over a bill or note when he discounts it, whether this is done by giving money for it, or by appropriating it to the payment of advances already made

¹ *Per* Lord Ellenborough, in *Giles v. Perkins*, 9 East. 14; *per* Abbott, C. J., in *Bolland v. Bygrave*, 1 R. and M. 271. But, indeed, the same doctrine is implied in all the cases already cited, where bills or notes were deposited with a banker on the remitter's general account, since the claim for restitution of them, in all these cases, proceeds on the assumption, that the customer has relieved the banker from advances made or engagements entered into on his account. In *Scott and others v. Franklin*, 15 East. 428, a banker was found entitled to exact payment from the drawer of a bill indorsed to and deposited with him, to the extent of his balance, though the remitter had offered *generally* to pay the balance, *if any was due*.

² *Vide* 2 Bell, 120.

³ *Vide* 2 Bell, 119. The same doctrine is implied in Lord Kenyon's opinion in *Davis v. Bowsher*, 5 T. R. 491, and was also held by the Court of Common Pleas, in *Key v. Flint*, 8 Taunt. 21, where the question was, whether a bill deposited with a banker for the specific purpose of raising money on it, could not be reclaimed by the depositor's assignees, on their repaying the banker the money which he had advanced on it, or whether he could retain it for his general balance. The Court decided in favour of the assignees. The special nature of the deposit was held to exclude any plea of mutual credit. This judgment was afterwards affirmed on an application by the banker for relief to the Court of Chancery. *Ex parte Flint*, 1 Swanst. 30. In a Scotch case, *Matheson v. Anderson*, 12th June 1822, 1 S. and B. 486, it was found that certain bills which had been indorsed to a banker, for the special purpose of getting them accepted, could not be retained by him, in security even of a debt due to him by the indorser.

⁴ *Vere ex parte*, 4 D. and Ch. 295.

by him ¹. But other bills or notes not so discounted, may be still retained for his general balance, though that should be composed in part of the amount of the discounted bills ². It may be doubted ³, whether bankers are entitled in their account to charge interest in the form of discount on the particular bills discounted, whether the general balance of the account is in their favour or not; and thus, even supposing these bills have been paid, to deduct the discount from their amount as credited, and retain the undiscounted bills to make up the difference. This would be to apply the undiscounted bills indirectly in payment of the discount; whereas they are only applicable to the general balance, of which this discount forms no part, because it relates exclusively to the bills discounted.

If a bill is discounted, the discounteer, though he may rank for the full amount on the estate of each of the obligants, can only do so to the effect of recovering the amount of that bill; so that, if he has recovered 19s. *per* pound on it from the other obligants, he cannot rank on his customer's estate to the effect of recovering more than the remaining 1s. *per* pound due upon it. On the other hand, if the banker or factor holds the bill as a security for his general balance, he may, notwithstanding his possession of it, rank on his customer's estate for the whole balance, since the bill is given, not as a substitute for his claim, but in farther security of it; and, if part of the balance is still unpaid, he may then rank for the full amount of the bill on the estates of the other obligants, to the effect of making up the deficiency ⁴. In England, he is allowed to prove on such bills, to the effect of indemnifying him for other bills accepted by him for his customer, though not yet due; but he cannot draw a dividend till these his acceptances are paid ⁵.

A banker's lien does not extend to bills left with him solely

¹ This was admitted with regard to bills appropriated to certain special advances, in *Davis v. Bowsher*, 737, note 3.

² This was decided in *Davis v. Bowsher*, 737, note 3. *Vide* also the opinion of Abbott, C. J., to the same effect, at *Nisi Prius*, in *Hall* and another *v. Barnard*, 1 R. and M. 382.

³ *Vide* Lord Kenyon's opinion, in *Davis v. Bowsher*.

⁴ 2 Bell, 118.

⁵ *Per* the Lord Chancellor in *ex parte Bloxham*, 8 Ves. 532, referring to *ex parte Maydwell*, Cooke's B. L. 179.

for discount, but which he has refused to discount; for they have been placed in his hands for a purpose exclusive of the lien¹. But his lien extends to all bills and notes deposited with him, whether indorsed or not². When they are placed in his hands blank indorsed, or are indorsed to him, specially without restriction of his title, he may effectually impledge them with a third party for his own debt³. For his customer has entrusted him with the full power of transferring them, either in pledge or otherwise, so as to give a complete right to the transferee. But, when a bill or note is so indorsed as to exclude his power of transference, or is deposited with him unindorsed, he cannot convey even his own right of lien over it; since his right, *ex facie* of the document, is limited to the security resulting from the possession of it.

¹ 2 Bell, 120.

² *Per* Lord Ellenborough, in *Giles v. Perkins*, 9 East. 14. In *Jourdaine v. Lefevre*, 1 Esp. 66, Lord Kenyon found a banker entitled to retain a note which had been deposited with him, and entered short in his customer's account, in security of a general balance arising from bills which he had discounted for the customer, and which had turned out bad. It was held to make no difference that the discounted bills were in a separate account from the cash-account, in which the note in question had been entered.

³ *Vide* *Collins v. Martin*, and other cases, *antea*, 259. *Vide* also *Inglis v. Bruce* and others, creditors of Smith, M'George and Co., 17th June 1817, 2 Bell, 119, note 1.

SECTION III.

Effect of Bankruptcy or Insolvency on the Claims arising against the Bankrupt Estate from Bills or Notes.

1. Where the bankrupt estate has no counter claims against the holder of the bill or note, and,
2. Where there are such counter claims.

The last head will lead us to discuss the doctrine of compensation and retention as applicable to bills and notes, either when the holder of the bill or note pleads it in extinction of another debt, or when its currency is stopped by the holder's bankruptcy, so as to render it liable to a plea of compensation or retention by any of the obligants in it. Having thus examined it in its simple form, we shall then consider its application to the case of bills or notes held by two bankrupt estates against each other, and particularly how far, and under what limitations it is applicable to bills or notes granted by two different parties for each other's accommodation, in the event of both parties becoming bankrupt.

I. The subject included under this head shall be considered,

1. As to the claim of the holder or creditor in a bill or note.

The holder's title to any bill or note, *ex facie* forms a presumption of onerosity and *bona fides* in his favour, which, in Scotland ¹, under the exceptions already mentioned, cannot be disproved unless by his writ or oath. The extent of his claim on it, in these circumstances, is nearly the same as against solvent parties, in which view it has been already discussed ². The only difference is one established on the debtor's sequestration, by 54 Geo. III. c. 137, § 49, which enacts, regarding the mode of settling interest on debts ranked under a sequestration, that "the principal sum of each debt on which interest is chargeable, together with the bygone interest due upon it, if there be any, shall be accumulated as at the date of the said first deliverances," on the petition for sequestra-

¹ *Antea*, 93, *et seq.*

² *Antea*, 579, *et seq.*

tion, in order that the different dividends may be counted on such accumulated sums, or on the principal sums when the debts bear no interest, or, in the case of future debts, on the principal sum, under deduction of interest for the time that the debt has to run, without counting interest on these claims from the date of the first deliverance; but that the creditor shall be entitled to claim interest from that date, on the whole of such sums, from any balance which may remain after the full sums ranked have been paid. According to this enactment, the accumulated sum ranked on account of a bill or note already due will consist, 1st, Of its amount; 2dly, Of interest from its date, in case of non-acceptance, or, if it is accepted, from the term of payment; or, 3dly, If interest has been stipulated in the bill, and a charge has been given for it as well as for the principal sum, the interest accruing from the date of the denunciation will be joined to the principal sum, and the arrears of interest due on this accumulated sum at the date of sequestration, will be added to it, to complete the sum to be ranked. The exchange and other damages and expenses must likewise be added to the sum ranked. But it does not appear that arrears of interest are chargeable on them, unless their amount has been ascertained by a decree, in which case interest would probably be allowed on them *ex mora*, from the time when they were incurred, and a protest taken for them.

It will not form a ground of abatement from the holder's claim, that he has only paid the amount of the bill or note to the former holder, under deduction of discount, since discount is his legal compensation for advancing money on it¹. He may also prove for the full amount of a bill or note due to his author, although he should have paid only 10s. *per* pound for it, as he may acquire a bill-debt, like any other debt, by purchase, on what terms he pleases². It may even be held, that a bill or note, indorsed as a donation, affords a claim for its amount against the obligants³. If the holder's author has got the bill or note from a third party for his accommodation, the holder, if he has paid full value, may claim its full amount,

¹ *Ex parte Marljar*, 1 Atk. 150; noticed also in Cooke's B. L. 195, 8th edit.

² *Ex parte Lee*, 1 P. Williams, 782; *ex parte Upham*, 17 Vesey, 212.

³ *Antea*, 20.

either against the grantor, if solvent, or against his estate, if he is bankrupt, although he knew, when he took it, that it was an accommodation bill or note. Even if he has advanced on the faith of it a sum less than its amount, or has taken it in security of such a sum, or has received part payment of this sum after it was given him, yet it has been held in England, and would probably be held in Scotland, that he may rank for the full amount, to the effect of drawing complete payment of the debt for which he took it. It is in this case a separate security on which he relied, and he cannot have the full benefit of it, unless by ranking to this extent. It is thus applied, as it was intended, for the accommodation of the party giving it¹. But the holder cannot prove on such a security against his own debtor, beyond the amount of his debt². When such bills are delivered by the drawer to a creditor, as collateral securities for a debt larger than their amount, and both drawer and acceptor become bankrupt, but the acceptor's estate proves solvent, it has been decided, that the creditor is both entitled to draw 20s. *per* pound on the bills from the acceptor's estate, and also to prove his original debt against the drawer's estate, and draw dividends on the ranking, in liquidation of the balance of it³. But, when bills taken as collateral securities for a debt due by the acceptor, were paid in full by other obligants, after the creditor had ranked for his whole debt on the acceptor's estate, *excepting the bills as securities*, it has been decided⁴, that the amount of the bills thus paid must be deducted from the amount of proof for which he was entitled to

¹ *Ex parte* King, 1 Cooke, 177; *ex parte* Crossley, *ibid.* and 3 Br. Ch. Cas. 237. In this last case, the holder of the bill had received part payment of his debt after the bill was given to him. *Ex parte* Bloxham, 6 Ves. 449, *per* Lord Eldon, Chancellor. In *ex parte* Bloxham, 5 Ves. 448, Lord Loughborough, Chancellor, had ruled that the holder, in such a case, was not entitled to rank for more than the amount of his debt. But the contrary was afterwards ruled by Lord Eldon, in the case now mentioned; and Lord Loughborough's order was accordingly reversed; 6 Ves. 600.

² *Per* Lord Chancellor in *ex parte* Bloxham, 6 Ves. 450. This doctrine is also implied in *ex parte* De Tastet, 1 Rose's B. C. 11.

³ *Saunmon ex parte*, 1 D. and Ch. 564. *Contra*, *Rufford ex parte*, 1 Gl. and Jam. 41. *Vide* also *Read and others ex parte*, 3 D. and Ch. 48, where the holders of bills indorsed to them in security of a debt, were allowed to rank for them on the estates both of drawer and acceptor, to the effect of recovering the full debt and interest.

⁴ *Bunskill ex parte*, 4 D. and Ch. 442. *Vide* *Reaucher ex parte*, Buck. 381, cited in *Roscoe*, 339.

draw dividends from the acceptor's estate. It has been also decided¹, that, where a creditor took a bill, signed by a third party, for his debtor's accommodation, on a direct understanding with that party, that he held it only for the debt ultimately due to him, he cannot prove against the grantor of the bill for its full amount, but only for the balance of the original debt remaining, after deducting the dividend drawn from the primary debtor's estate. It has been decided², that a person receiving goods from his debtor, with permission to sell them for payment of his advances, but thereafter selling them to a broker for his own debtor, and taking bills for the price directly from the debtor, is not entitled to prove on these bills against his debtor's bankrupt estate for more than the amount of his advances. It was held that such a transaction could not be considered as properly a sale, but merely as a return of the goods, whereby the lien over them was renounced, and nothing remained but a personal claim for the advances. If the creditor has received, on account of his debt, a bill or note which he has failed to negotiate³, this must be deducted from the sum for which he ranks, because his claim against the debtor is held *pro tanto* to be extinguished. If a creditor has received, in part payment of his debt, a draft or indorsation, which is reducible by other creditors, this cannot be deducted from the sum for which he is to be ranked, if he is willing that it should go into the common fund⁴.

The creditor in a bill or note may claim on it against the debtor's sequestrated estate, although it is not yet due; for the last bankrupt statute, § 47, enacts, "That, in all questions upon this act, persons to whom the debtor is under obligation to pay money at a certain future time, shall be accounted creditors *de presenti* for the amount of the money, discounting the interest to the term of payment specified in the obligation, and may prove their debts in the same way as other creditors, and shall be entitled to their rateable

¹ Reader *ex parte*, 1 Buck. B. C. 281.

² *Ex parte* Thompson, 18 Ves. 231.

³ This doctrine is implied in *Bickerdike v. Bolman*, 1 T. R. 405, although notice of dishonour was held to be unnecessary in that case, because the drawer had no effects in the drawee's hands.

⁴ 2 Bell, 322-3, and *Mann v. Shepherd*, 6 T. R. 79.

“dividends accordingly.” In the case of a bond payable by instalments, (and the same doctrine is applicable to a bill or note so payable), it was decided, that, although the creditor claiming and drawing dividends on the debt under this clause of the statute; did so specially with reference to all the different instalments, yet, if the total sum which he thus drew exceeded the amount of the first instalment, he was not entitled, in a question of diligence, to impute to that instalment only a rateable proportion of the whole dividends received, and then, after it fell due, to raise diligence against the debtor for the balance, as still unpaid, but that, in such a question, this instalment must be considered as extinguished by the total sum which he received ¹. But this judgment was reversed on appeal ². The creditor is not entitled, by the enactment now cited, to draw any dividend on account of the future instalments, but by ranking specially for them; and dividends thus received and imputed specially to future instalments could not be also imputed, for any purpose whatever, to the first instalment. Besides, if they were so imputed in a question of diligence, future instalments, notwithstanding the dividends thus drawn on account of them, must be considered as altogether unpaid, so that the creditor would be still entitled, when they became payable, to raise diligence for their full amount, though directly contrary to the mode in which he had been ranked under the statute.

It appears to be settled, that a creditor for a future debt may join in a petition for the debtor's sequestration, the statutory amount of his debt being fixed by making the deduction now specified. The statute, § 15, authorises creditors generally to join in this petition; and the only exception is that contained in § 24, of creditors “whose claim upon the bankrupt estate is merely contingent, or depending on an uncertain condition.” It is provided by this section, that such creditors shall not “be entitled either to join in the petition above mentioned for sequestration, or to vote in the choice of factor or trustee.” But there is no exclusion of creditors in future debts ³.

¹ *McNie v. Bulmanno*, 25th May 1824, 3 S. and D. 60.

² 2 W. S. App. Cas. 7.

³ *File 2 Bell*, 320.

When a trustee under a sequestration has ranked a creditor on a bill, and prepared and advertised the scheme of division, containing a dividend on it, in terms of the statute, he is not entitled afterwards to state any objection against the grounds of debt¹. If a cautioner for payment of a bill is ranked for its full amount on the drawer's estate, as having paid it, though on an affidavit which admits that he got the greater part of the amount from an indorser of the bill, he, not the indorser, is held to be *in titulo* of the dividend, and it cannot be arrested in the trustee's hands by a creditor of the indorser².

The holder of a bill or note is entitled, on non-payment by the acceptor or granter, to claim its full amount from each of the other obligants. He may, therefore, either exact the full sum from one of them, or obtain partial payments from them severally, in what proportions he chooses, till the whole is paid.

While they are solvent, this can create no difficulty. Nor is there much difficulty, though they are all insolvent, if he has ranked on all the estates before any of them yields a dividend; for, as he will be entitled to rank on each for the whole amount of the bill or note, to the effect of drawing full payment, the obligation of each party is as available for the whole debt, as if each had granted a separate obligation; and nothing can prevent him from enforcing it against each, but the plea that he would thereby obtain more than full payment. Under this exception, his right to enforce the full obligation remains entire, notwithstanding any partial payment which he may have got from the estates of other obligants, whether by ranking or otherwise³. But, in England, it has been decided, that, when a dividend has been paid, or even declared on the estate of one obligant, before the holder of the bill or note has proved against the estates of the other obligants, he cannot rank on them for more than the balance remaining after

¹ Gillespie v. Barbour, 27th May 1835, 13 S. D. B. 835.

² Barbour v. Williamson and others, 10th Nov. 1835, 14 S. D. B. 27.

³ 2 Bell, 337-8; *ex parte* Wildman, 2 Vesey sen. 113, *per* Lord Chancellor Hardwicke, referred to in 12 Ves. jun. 438; also *per* Lord Chancellor Eldon in *ex parte* Russell, 10 Ves. 416; Cooke, B. L. 173, Cullen, 96. The same rule, which is stated in a number of other cases as completely settled, is repeated by the Lord Chancellor, in *ex parte* the Bank of Scotland, 19 Ves. 310, although that case was held, for a reason to be immediately mentioned, not to fall under the rule. A contrary doctrine was once laid down in *ex parte* Le Fevre, 2 P. Williams, 407; but it is now held to be erroneous; 2 Christian, 360.

deduction of this dividend¹. In Scotland, there have been several decisions connected with this subject. One of these occurred² in a case where the acceptors of a bill had made partial payments to account of it before it fell due, but after the payee and indorser, being insolvent, had executed a trust-conveyance of his whole effects for behoof of his creditors. In these circumstances, the bill having been protested when it fell due, and diligence raised on it, after which the protest and diligence were assigned to another party on his taking it up, this party was found not entitled to recover, under his assignation, from the estate of the payee and indorser, more than the balance remaining after deduction of the partial payments by the acceptors. It seems to have been held, that the payee's trust-conveyance for behoof of his creditors, though made before any of the partial payments, did not, therefore, give the holder a claim for the full amount of the bill, seeing it was reduced by the payments before it became due. A similar rule was adopted³ regarding the sum to be ranked under a composition-contract, it being held that the creditor in a bill, having got another bill indorsed to him in payment of the original bill, which last bill was paid before he subscribed the contract, the amount of the last bill, on its being paid, must be deducted from the sum for which he was entitled to rank under the composition-contract. But a different rule was

¹ This was ruled in *ex parte* Ryswick, 2 P. Williams, 89, where the holder of a bill having received a dividend from one party's estate, was found not entitled to rank on the estate of another party for more than the balance. In *Cooper v. Pepys*, 1 Atk. 106, parties who had merely accepted a composition from the estate of one obligant in certain promissory-notes, before proving on the estate of another, were found not entitled to rank for more than the balance. In *ex parte* Leers, 6 Ves. 645, and *ex parte* Todd, 2 Rose's B. C. 202, note, it was decided that, where dividends on the estate of one obligant had been even declared before proving against the estate of another obligant, the creditor could only rank for the balance; because the dividend, as soon as declared, was his money in the hands of the assignees, which he might have therefore received before his proof. In *ex parte* the Bank of Scotland, 19 Ves. 310, where a dividend had been not only declared, but received by the creditor's agent, though without his knowledge, the Lord Chancellor decided, after much consideration and with great reluctance, that the creditor proving afterwards against the estate of another obligant could only be ranked for the balance. The rule appears thus to be the same, whether the dividend has been received, or has only been declared.

² *Dunlop v. Speirs*, 5th Feb. 1779, Morr. 14107.

³ *Darr v. Livingstone*, 4th June 1824, 3 S. and D. 100.

adopted, in a case¹ where the payee and indorser of a bill had made partial payments to account of it before it became due, but after the acceptor's estate had been *sequestered*. In that case, the holder of the bill was, notwithstanding, found entitled to rank on the acceptor's sequestered estate for its full amount, it being held, that sequestration operated as an assignment of the debtor's effects to all his creditors for payment of their debts, (§ 30,) whether then due or not, (seeing that, by § 47. of the bankrupt statute, future creditors are declared to be creditors *de presenti* for their debts, under deduction of interest to the term of payment,) "and that, therefore, the date "of sequestration must be taken as the point of time at which "to estimate the amount of the debt to be ranked." The same doctrine has been recognised in two subsequent cases². These judgments appear to have proceeded on the terms of the statute, as to the special case of sequestrations. But the other cases cited authorise a different rule as to the effect of partial payments on a bill or note, when made either before or after it becomes due, in limiting the balance to be ranked on the estate of any of the obligants under a private trust.

The adoption of the English rule, even in this case, may often lead to capricious results; for example, by making the amount of the dividend obtained from one estate depend on the accident of the creditor not ranking on it first, but ranking first on another estate, on which a dividend has been declared. Besides, a dividend drawn from one estate, for the full sum ranked, though it may satisfy the security on it, does not satisfy the separate security held against another estate³. But it may be doubted whether this dividend should not be considered at least as a partial payment to account of *the debt*; and, if the debt has been thus diminished by receipt of a dividend from one estate, before it is ranked on the other, it does not appear, in the case of a private trust, how it can still be ranked for the full sum, as if there had been no such payment. The security which is still held against the separate estate would rather seem to depend on the actual amount of the debt, so as to be lessened as the debt is diminished; as an heritable

¹ Robertson v. Bank of Scotland, 3d July 1823, 2 S. and D. 450, and F. C.

² Mein v. Sanders, 6th March 1824, 2 S. and D. 178, F. C., and Farquharson v. Mason, Baird and Co.'s Trustee, 15th May 1832, 10 S. D. B. 526.

³ 2 Bell, 291, 4th edition.

security, when a partial payment of the debt has been made from the debtor's other funds, ceases to be available for more than the unpaid balance ¹. If this principle is correct, the accidental hardship which the application of it may sometimes produce, affords no reason for deviating from it.

When a person proves in England for the full amount of several bills which he has discounted, and thereafter receives payment of some of them in full, it has been decided ², that he must deduct from his proof the amount of the bills thus paid; and it has been also decided ³, that, when a party proves for the full amount of a debt, in security of which he has got several bills or notes, and thereafter receives full payment of them, he must restrict his proof to the total balance remaining due after deducting such payment. These seem to have been considered, not as cases of ranking on different securities, but of partial payments to account of the debt, made by the extinction, in the first case, of some of the bills that constituted a part of it; and, in the second case, of a bill given in security of it. A different doctrine, however, has been held in Scotland. In one case ⁴, certain bills which had been indorsed to bankers by a customer, in security of their advances for him, having been fully paid after their customer's sequestration, they were, notwithstanding, found entitled to rank on his estate for the whole of their advances, to the effect of recovering full payment. This decision may, perhaps, have proceeded on a clause of the bankrupt act 1783, (under which the sequestration was awarded,) but which is not contained in the present act, whereby partial payments received from other obligants after the debtor's sequestration, are not allowed to be deducted from the amount of the creditor's ranking. But, in a later case ⁵, where the accommodation acceptor of certain bills, who had got them up on payment, had recovered the

¹ 2 Bell, 289-90.

² *Ex parte Smith*, in *re Lewis and Potter*, Cooke, 175; *Barret ex parte*, 1 Gl. and Jam. 327.

³ *Ex parte Bloxham*, *ex parte Wallace*, Cooke, 176; *ex parte Burn*, 2 Rose's B. C. 55. *Vide also Brunskill*, *ex parte* 4 D. and Ch. 442, and *Vere ex parte*, 4 D. and Ch. 123, 2 Mont. and Ayr. 295.

⁴ *Fall and Co.'s Trustee v. Sir William Forbes and Co.*, 27th May 1790, *Morr.* 14135.

⁵ *M'Dougal v. M'Dougal*, 5th June 1801, *Morr.* App. to right in security, No. 1.

price of a ship which was mortgaged to him in security of these bills, he was found entitled still to rank for the full amount of the bills against the real debtor, on the ground that the holder of two securities may claim on each *in solidum*, to the effect of recovering complete payment. This principle may probably be held to extend even to the case of payments received from third parties on bills indorsed in security of a debt, as in the first case now cited, because, if such bills are considered as separate securities, no payment made on them can, according to the foregoing doctrine, interfere with the creditor's right to rank against his debtor for the full debt. This doctrine seems applicable even to ranking under private trusts; and, accordingly, in one case¹, it appears to have been assumed, that a bill indorsed by a debtor to his creditor on account of his debt, before the creditor subscribed a composition-contract, was not to be deducted from the sum to be ranked for the composition, (even though it was ultimately paid,) if it had been indorsed merely as a security for the debt. But the Court was satisfied that it had been intended from the first as a payment, and, therefore, the creditor was allowed only to draw a composition on the balance, after deducting it. The sum to be ranked under a sequestration is held, according to two decisions already noticed, to be regulated in all cases by the amount of the debt at the date of sequestration.

When two bills have been drawn by a company on one acceptor, but indorsed to two different parties, it has been decided, that, although the drawee is liable only for one, both are entitled to rank on the estate of the company which issued them². In Scotland, on the bankruptcy of the company, or of the individual partners, the creditor of the company in a bill or note ranks for it, first, on the company's estate, and then only for the balance against the estates of the individual partners³. The creditor of an individual partner can only claim against that balance of the company funds which remains due to his debtor, after the company debts are paid. Since this balance is a portion of the partner's individual estate, the claim of his creditors against it is only part of the ranking on his estate;

¹ Barr v. Livingstone, 4th June 1824, 3 S. and D. 100.

² Farquharson v. Mason, Baird and Co.'s Trustee, 15th May 1832, 10 S. D. B. 525.

³ 2 Bell, 661.

and, therefore, though they have previously drawn a dividend from his individual estate, they may still rank for their full debt on his share of the company funds, to the effect of drawing another dividend. In England, the doctrine now explained as to the ranking of company and individual creditors, is the rule at common law ¹. But the rule established there in equity is, that the company creditors can only claim, first, against the company estate, and the individual creditors of partners against their separate estates, there being no claim by the former against the separate estate of partners, or by the latter against the company estate, except in so far as there is a surplus on each after paying its own class of creditors ². It has been decided, however, that, when a bill drawn by a company is subscribed by partners of the firm separately, for instance, under a distinct firm, the holder, if he was ignorant of the partnership, may sue each of the parties according to his liability on the bill ³. It does not even appear that his knowledge of the partnership should prevent him from claiming against each of the parties, according to the obligations undertaken by each of them on the face of the bill. If different partners of a firm are engaged in separate trades under other firms, and any of these firms is subscribed to a bill or note, though it should be taken for a joint debt, the creditor will be entitled to rank on the estate of the separate firm, under its subscription, as well as against the common partnership, which is his proper debtor ⁴. So, if one of several partners draws a bill on two other partners, who are joined in a distinct concern, and they accept it, though for a joint debt due for a common adventure, the holder may rank on the estates both of the drawer and acceptors ⁵.

We shall now consider,

2. The claims of the different obligants in a bill or note against each other, from having made payment to the creditor.

It has been shewn, that, *ex facie* of a bill or note, the drawer

¹ Cullen, 459-60.

² Cullen, 460-1.

³ *Ex parte Adam*, 2 Rose, B. C. 36. *Ex parte Parr*, 18 Ves. 65; also *Montague*, B. L. 230.

⁴ *Per* the Lord Chancellor in *ex parte Bonbonus*, 8 Ves. 546.

⁵ *Ex parte Walker, ex parte Weansley*, 1 Rose, B. C. 441. But *vide Mould ex parte*, noticed in Chitty, *addenda*, 604, where, in a question somewhat similar, the Court of Review in Bankruptcy seems to have been equally divided.

of the bill or indorser of the note has a claim of relief for payments made by him against the acceptor or granter, (and the indorser against the drawer as well as acceptor) ; and farther, that a posterior indorser has a claim *in solidum*, both against these parties, and against prior indorsers. If a party pays the whole debt, but only in that case, he is entitled to rank for its amount on the estate of each of the prior parties, to the effect of making good his full claim of relief. If the holder cannot get full payment, even by ranking on the estate of each obligant for the whole debt, none of these obligants can rank with him on the estate of a prior obligant, for relief from the dividend paid by his estate ; because such ranking would diminish *pro tanto* the dividend accruing to the holder from that estate, and to this extent, draw back from him the dividend thus ranked. But each obligant is, with reference to the holder, a principal debtor for the full debt, and cannot, therefore, thus draw back from him, any part of the dividend which he has paid, or lessen his creditor's ranking against other estates, which are equally bound to him for the full amount. When the surety is liable to the holder of a bill or note as an indorser, he must pay its full amount, if required ; and will then have all the holder's rights against the prior obligants, by becoming holder. But it is the same thing whether he thus draws back his relief from the prior obligants, after paying the full sum, or whether the holder ranks on their estates first, and comes against him for the surplus ; since his loss will amount, in both cases, to that proportion of the bill or note which the estates of the prior obligants could not satisfy¹. But, as the holder can only rank on the several estates to the effect of drawing full payment, the right of any obligant to rank for relief takes effect as soon as the holder is paid ; and, therefore, if there is any surplus of the dividends accruing to his ranking on any of the estates, after his claims are satisfied, or any dividends effeiring to the debt from estates on which he has not ranked, posterior obligants will be entitled to draw these dividends in relief, the last obligant being always preferred over prior obligants, who are bound to him, as all the obligants are to the principal creditor. Nor have the other creditors on the estate that yields these sur-

¹ Chitty, 442 ; 1 Bell, 347-8 ; 2 Christian, 370-2, and cases therein cited.

plus dividends an interest to resist this measure, since their debtor's estate is bound for the whole debt, and it is *jus tertii* to them whether its full amount be ranked by the proper creditor, or by another person, to draw back a portion of the debt paid by him, and for which the estate is liable to him. The holder is bound, after being paid, to assign his right to any obligant, in order to facilitate his claim of relief; but the claim is effectual, independently of an assignation. If the estate of any obligant affords the full debt, each posterior obligant will be relieved from it, either by the creditor drawing full payment from that estate, or by their coming into his right against it, for relief of the sum paid by them. But no debt can be ranked twice on the same estate. This doctrine is settled both in Scotland and England¹.

If a party has subscribed a bill or note solely for the benefit of another, although *ex facie* of the bill or note he appears to be debtor, he will be entitled to come in place of the principal creditor, for relief, against the estate of the party accommodated, and of any parties bound to him. But, as to subsequent parties who gave value on the faith of his signature, though they should know his real character, he will still be principal debtor, since they relied on his character *ex facie* of the bill or note².

In Scotland, if the drawer or indorser of a bill or note is bankrupt, while the acceptor or granter is solvent, the holder may rank on the estates of the drawer or indorsers, to the effect of having a dividend set apart to him, if he should not recover payment from the acceptor or granter. An indorser may also rank on the estate of the acceptor or any previous party, if the holder has not ranked, to the effect of having dividends set apart for his relief, if he should be obliged to make full payment to the holder. In both these cases, the claim, being a contingent claim, is regulated, as to ranking on a sequestrated estate, by 54 G. III. c. 137, § 48, which enacts, "That, where a claim is entered by a creditor upon
"any obligation, the existence or amount of which depends
"upon a contingency which is still unascertained at the period

¹ 2 Bell, 527. The same doctrine is laid down as a fundamental rule, by the Lord Chancellor, in *ex parte Walker*, 4 Ves. 385. Indeed, it is implied in every case which refers to the subject. *Vide also* Bayley, 436; Chitty, 683.

² *Antea*, 365, *et seq.*

“ of lodging the claim, the trustee shall rank the claimant as
 “ if the condition were purified ; but the dividend or sum
 “ which the claimant would be entitled, in that case, to draw,
 “ shall be again deposited at interest, in the bank or on heri-
 “ table security, and the interest thereupon arising shall be-
 “ long to the creditors, and be included in the fund for their
 “ dividends, until the contingency upon which the obligation
 “ depends shall be declared, when the dividend so deposited
 “ shall belong to the claimant or the other creditors, accord-
 “ ing to the terms of the obligation.” According to this
 clause, the holder, on the sequestration of an indorser or other
 cautioner, must be ranked on his estate for the whole sum, to
 be paid him contingently if the principal debtor does not pay,
 or an indorser may be ranked in the same way on the estate
 of a prior obligant, to the effect of getting the whole dividend,
 if the holder has received full payment from him, or at least
 to the effect of getting what surplus of the dividend may re-
 main after the holder has been paid. The indorser's rights,
 in this case, as to the holder, depend on the principles which
 have been already explained.

We shall now consider,

II. The effect of counter claims as to bills and notes, whether the holder founds on such documents as grounds of set-off against other claims, or whether any of the obligants set off other claims against them by compensation or retention, in the only case where they are liable to such exceptions, viz. when their currency is stopped by the holder's sequestration.

Compensation is a privilege by which a debtor may set off against his debt a counter claim which he has against his creditor. It has been sanctioned in Scotland by an early statute¹, which enacts that liquid debts, or debts capable of being instantly verified by writ or oath, may be set off against each other by exception, but not in a suspension or reduction, after decree for one of them has been pronounced. It has been held², that this act does not exclude compensation at common law. Indeed, it is confined to the case where compensation is pleaded against a liquid claim, in which case this defence is allowed by the act only on such counter claims

¹ 1592, c. 143.

² 2 Bell, 127.

as are either liquid or susceptible of immediate liquidation¹. If both the opposing claims are illiquid, they must be ascertained by separate actions; and, in that case, the two actions ought to be conjoined, so as to form the grounds of mutual accounting. This result, though not authorised by the statute, is founded on the same principle with compensation, and may be considered as an example of that defence at common law. But, at present, we have only to consider compensation *de liquido in liquidum*, since it is alone applicable, whether pleaded upon or against a bill or note. Such a document is, of course, a good ground of compensation. On the other hand, no claim can be pleaded against it that is not exigible at the same time with it, and either liquidated in money, or capable of being so immediately. It has been even doubted, and with reason, whether a bill or note payable in one place could form a ground of compensation against a bill or note payable in a different place², since no party is bound to take his money, by compensation or otherwise, at a place different from that where his debtor agreed to pay it. This strictness of compensation, however, is modified, so as to suit the course of business, by the additional remedy of retention, whereby a person lawfully in possession of a property or right belonging to another³, or who is his debtor, even in a liquid debt, is entitled, under certain circumstances, to retain it for securing his payment even of a future or uncertain debt. This remedy, excepting in several cases of lien, which, so far as they apply to bills and notes, have been already considered⁴, cannot be employed

¹ *Vide* cases on this subject in *Morr.* 2564-8.

² *Pothier*, No. 187.

³ In *Dougal v. Gordon*, 17th Nov. 1795, *Morr.* 851, a person who had got an assignation to a debt absolute *ex facie*, but really in security of certain bills due to him by the cedent, was found entitled, after these bills had been taken up by others, still to retain the assignation in security of the new bills, in respect that, by having possession of the debt under an assignation *ex facie* absolute, he was entitled to retain it in security of any debt due to him. This doctrine was held, even on the supposition that the old bills, in security of which the assignation was originally granted, had been altogether extinguished by novation. In *Balleney v. Raeburn and Co.*, 7th June 1808, *Morr.* App. to Compensation, Part i. p. 6, a party who had got a vendition to a ship *ex facie* absolute, but really for his relief from certain bills accepted by him for the grantor of the vendition, was found entitled, in a question with the grantor's creditors, even after these bills were retired, to retain the vendition in security of other debts due to him, by virtue of the right of possession which he had from the absolute nature of the vendition.

⁴ *Antea*, 736, *et seq.*

to secure future or unliquidated debts, unless in the event of the debtor's actual or certain insolvency¹. In that case, and still more in the case of bankruptcy and sequestration, a liquid debt may be retained in security of any claim, though illiquid, and though differing from it, in the time, place and kind of prestation into which it is resolvable; nor is the debtor bound to make payment till his claim is liquidated, and either paid or deducted from the other claim². All claims, therefore, may be set off against bills or notes on the holder's bankruptcy, if not by compensation, at least by retention.

Neither compensation nor retention can attach to a deposit, since its very nature excludes counter claims. This is the rule, not only when money or goods deposited remain distinguished as a species, but where money, even without continuing thus distinguished, is entrusted to a person for a special purpose,—for instance, to a banker to pay a bill falling due at his bank, in which case he cannot set it off against a debt due to himself, either under his lien as banker, or by the general right of retention or compensation³. Nor can compensation or retention be pleaded on a factor's private debt, against engagements concluded with him as factor. Such engagements cannot be compensated unless by the debts of his principal; and debts due to the factor individually cannot be compensated by, or retained in security of debts contracted by him as factor⁴. If, indeed, he has a commission *del credere*, he may set off any claim due to him as factor against a claim by the debtor on him individually; because, in that case, *he* is liable directly to his constituent, and has a claim at his own instance against the debtor, which may, therefore, be set off against his private debt⁵. But the principal has

¹ Erskine, iii. 4. 20; 2 Bell, 128.

² 2 Bell, 127, *et seq.*

³ *Antea*, 737, 2 Bell, 129. The doctrine now stated was adopted by the Court in *Stewart v. Bisset*, 15th Feb. 1779, *Morr. Part I. of App. to Compensation*, 4, where a merchant, who had got money from the debtor in a bill to pay it for his behoof, was found accountable for the money to the creditor in the bill upon the debtor's bankruptcy, without regard to his having set off the money against a debt due by the remitter to himself, in consequence of the bill not being forthcoming from the creditor when he first offered to make payment of it.

⁴ 2 Bell, 132.

⁵ *Ibid.* *Grove v. Dubois*, 1 T. R. 115, by which decision, in another case of *Bize v. Dickason*, 1 T. R. 286, the point was held to be completely settled.

also an independent claim against the debtor in addition to the factor's guarantee; and hence, the debtor cannot, on the factor's failure, compensate his claim, if made by the principal, by the factor's private debt¹; while the principal, to make good his own claim against the debtor, may set it off against a claim due by himself to that debtor². If, however, the factor deals in his own name, any person transacting with him may set off the factor's private debts against the latter's engagements to him³; while, on the other hand, the factor's engagements in such a case, being contracted merely in his own name, cannot be set off against separate claims by the principal, seeing the latter is no direct party to the transaction, but has merely a personal claim against the factor on account of it. This personal claim is different from the real right already considered⁴, which a principal has in effects, or even money that is merely entrusted to his factor, so long as it can be distinguished from the rest of the factor's property.

It has been decided, that a claim by the trustee for the creditors of the holder of a bill, for the fund in the drawer's hands, by virtue of a protest for non-acceptance, cannot be compensated by a counter claim made against him by the trustee for the drawer's creditors, for the amount of a bill sub-

¹ 2 Bell, 132. The principal's right in such a case to claim directly against the purchaser of goods sold on his account, for the price, was recognised in *ex parte Murray*, Cooke's B. L. 384.

² *Ferrier v. The British Linen Company*, *antea*, 228, note 1.

³ *Baxter v. Bell and Maxwell*, 17th Dec. 1800, *Morr. Part I. App. v. Compensation*, p. 5. In this case the defenders, being debtors for the price of goods sold to them by a merchant in his own name, (though really for behoof of a person who had consigned them to him,—a fact which the buyers did not know,) were found entitled, on his bankruptcy, to set off the price against a bill due to them by him individually. A similar decision was given regarding a counter claim pleaded under the like circumstances in *Hitchiner, Hunter and Co. v. Stewart and Ninian*, 8th Dec. 1803, *Morr. 14204*. These decisions must be held to overrule the earlier cases of *Alison v. Fairholme*, Nov. 1765, *Morr. 15132*, and *Belches v. Johnston*, 31st Jan. 1770, *Morr. Part I. of App. to Compensation*, 1, in so far as they are of a contrary tendency. For an account of the first of these cases, *vide* 724, note 1. The doctrine now stated was adopted in England by the Court of King's Bench in *George v. Clagget*, 7 T. R. 359, in conformity with a previous case, *Rabone v. Williams*, cited in 7 T. R. 360, note, in which Lord Mansfield had laid down the law to the foregoing effect.

⁴ *Antea*, 721, *et seq.*

sequently granted to him by the holder for the price of part of the drawer's property purchased by him ¹.

It has been laid down, that, during the subsistence of a partnership, no one partner can set off a debt due to himself individually against a company debt, seeing the company is the proper debtor, and that, on this principle, no debt due by an individual partner can be set off against a claim by a subsisting company. There cannot, it is said, be a *concur-sus debiti et crediti* in either case, because the creditor is not the same person with the debtor ². But the most recent authorities in Scotland appear to authorise this conclusion, that, as a partner may be sued directly, even during the subsistence of the company, for the whole of any company debt, he is entitled, even then, to compensate such debt by his own private claims, because his right of compensation should be always commensurate with his liability ³. But it does not follow that a claim by the company can be compensated by the debt of a single partner; because, although he is liable for all the company debts, the company is not liable for his private debts, and hence there is not in this case a *concur-sus debiti et crediti*. When the company is dissolved, each partner, being then liable for the whole of the company debts, is entitled to compensate them, if payment of them is demanded from him, by any debts due to himself *privato nomine* ⁴. It has been

¹ *Falconer v. Campbell*, 22d Jan. 1824, 2 S. and D. 630.

² 2 Bell, 664.

³ This doctrine is contrary to that held in *Mackie v. M'Dowal*, 29th Nov. 1774, *Morr.* 2575. But it was laid down in the more recent cases of *Bogle v. Ballantyne*, 8th July 1793, *Morr.* 2581, and *Scott v. Hall and Bisset*, 13th June 1809, in both of which cases, although the defence of compensation was pleaded by the partner of a dissolved company, it was held to be equally competent to any one partner, though the company had subsisted and been solvent. The authority of these cases was confirmed in *Russell v. M'Nab*, 26th May 1824, 3 S. and D. 63, F. C., and *Salmon v. Padon, Vannon and Company*, 17th Dec. 1824, 3 S. and D. 406, F. C. In the latter case, where an action was brought against a subsisting company for the share of stock due to a retired partner, it was held that they might set off against it a payment made by one of their partners for this individual, on account of the debts of another concern for which he and they were jointly liable.

⁴ This doctrine was established in *Bogle's Trustees v. Ballantyne*, 8th July 1793, *Morr.* 2581, where it was decided, after the fullest discussion, that the partner of a dissolved company, being sued by the creditor of a deceased partner for his share of input stock, which was a company debt, was entitled to set off

said, that this right of compensation depends on the circumstance of the company creditor asking decree against the partner for his whole debt, since it is only by being thus made liable for the whole of it, that he can become entitled to compensate it to the full amount by his private debt. If the company creditor, therefore, claims the full debt only from their bankrupt estate, such a claim, it is said, cannot be met by compensation on the private debt of a partner, nor can any partner set off his private debt, except in so far as the company debt is made his, by suing him for it individually¹. But the doctrine adopted in the cases already cited, even with relation to a subsisting company, appears to be, that a partner's liability for the company debts entitles him to set off his private debt against it to the full amount. Farther, it has been decided, that the creditor of a company is not only entitled to recover his claim from an individual partner, but may, after the company is dissolved and bankrupt, make it good by pleading compensation or retention of a debt due by him to that partner individually². This right, indeed, according to the doctrine laid down in the cases now cited, appears to be applicable, even while the company subsists; because, if a company creditor is entitled to recover his claim against an indi-

against it a bill due to him by this deceased partner individually, although another partner, who was solvent, was a joint defender along with him; it being held that, as he was sued for the whole debt, he had a right to compensate it to its full amount. The same doctrine was recognised, and applied in *Scott v. Hall and Bisset*, 13th June 1809, and in a later case, *Russell v. M'Nab*, note 3, where the First Division of the Court proceeded on a review of all the preceding cases. In this case, a claim by the partner of a dissolved and bankrupt banking company for his private debt, was found to be compensated by a counter claim of his debtor on certain notes issued by the company, which it was found that he had a right to recover from any individual partner, and consequently to set off against a debt due by him to that partner. The doctrine laid down in the text has been also adopted in England, in *Lane's Assignees v. Slidstone*, 5 T. R. 493, and *French v. Andrade*, 6 T. R. 582.

¹ *Vide* a discussion on this subject by Mr Bell, ii. 664-5; also to the same purpose, the late Lord Meadowbank's notes on the case of *Bogle v. Ballantyne*, as quoted 2 Bell, 668. But *vide* Mr Bell's note, ii. 665-6, with regard to the interpretation put on the decision, *Bogle v. Ballantyne*, in the more recent cases. It must be now assumed, that, in the Court of Session, the law is settled as laid down in the text.

² *Russell v. M'Nab*, 757, note 3.

vidual partner, he must be equally entitled to retain what he owes to that partner, in extinction of it.

On the authority of the latest decisions now referred to, it has been held, that any one of several co-obligants in a bond to a bank, (though they are merely cautioners with reference to another of the obligants,) may, as each is liable for the full debt, compensate it to the full amount by a debt due by the bank to him individually ¹. This was the doctrine laid down by the Court, though merely in passing a bill of suspension. The case was held to be still stronger, as being argued on the assumption that the obligants had got a charge on the bond, because this was considered as a judicial demand for the full debt, which entitled them to defend themselves by pleading compensation to the same extent.

When the same company has two firms, a debt claimed from one of the firms may be compensated by a debt which the creditor owes to the other firm. The debtor and creditor are here identical ². When two companies are distinct from each other, in their partners, or otherwise, but a debt is contracted to a third party under a firm used indiscriminately by both companies, the creditor, if he does not know which company bound itself, may make his claim against either, or set off his claim against a debt due by him to either company ³. They have both subjected themselves to this risk, by adopting the same firm. But the creditor, by selecting one company, renounces all claim against the other, since only one of them can be bound to him. This doctrine has been adopted in two cases of claims made on bills signed by such an equivocal firm ⁴.

Compensation or retention is easily applied under the foregoing limitations, when the debtor becomes creditor of his

¹ *Dobson v. Christie*, 28th Feb. 1835, 13 S. D. B. 582. A similar ground of decision was adopted by Lord Jeffrey, in an analogous case, *Allan v. Christie*, Nov. 1835, where the interlocutor was acquiesced in.

² *Williams' Trustee v. Inglis, Borthwick Gilchrist and Co.*, 13th June 1809, F. C.

³ *Sir William Forbes v. Forrester's Creditors*, 27th Feb. 1798, 2 Bell, 670, note 1.

⁴ *Baker v. Charlton*, and *M'Nair v. Fleming*, cited, *ante*, 236, note 4; *vide* a full account of the grounds of judgment adopted by the Lord Chancellor in the latter of these cases, as given in a note by the late Sir Samuel Romilly, 2 Bell, 670, note 2.

creditor during his solvency. But the case is more difficult when he acquires a claim against him after his insolvency. If such a claim is acquired after the creditor is sequestrated, or his estate conveyed to a trustee for his creditors, there cannot be a *concursum debiti et crediti*, as the bankrupt is no longer creditor in the debt due to him, but is divested of it¹; and although his trustee or creditors must take it, subject to pleas of compensation or retention which *previously* attached to it, yet, after his claim has become vested in them, there are no longer *termini habiles* for raising a counter claim against it, by acquiring a debt in which he and not they are debtors. But, while the bankrupt remains undivested of his estate, and consequently of the claim in question, it does not appear that the debtor can be prevented from setting off against it a counter claim which he acquired, even after his bankruptcy, in the fair course of trade, as there is thus a direct *concursum debiti et crediti*. It will be a good objection, however, to the counter claim, that it has been acquired in the knowledge of the creditor's bankruptcy or insolvency, to create a preference. If the bankrupt has, within sixty days of his bankruptcy, entered into a transaction in favour of his debtor, without which he could not have been enabled to set off the counter claim against his debt to the estate, such a transaction will be reducible under the act 1696, as amounting to a security. This was the ground of challenge pleaded in a case already stated², where, however, the Court sustained the transaction, as one in the ordinary course of business. The acquisition of a claim against the bankrupt from a third party, with the sole view of extinguishing, by means of it, a debt which the acquirer owes to the bankrupt, will also exclude him from setting it off against his debt, because it is not a fair transaction in the course of business, but a fraud on that fair distribution of the bankrupt's funds, which must form the rule in every case of bankruptcy. Compensation and retention being merely equitable remedies, intended for the relief of parties who have acquired fairly the means of pleading them, cannot be thus perverted, *in fraudem* of the other creditors. As sequestration is a judicial act, it will be presumed, in questions of this kind, after

¹ 2 Bell, 130.

² Hepburn v. Bell, *ante*, 702, note 2.

it is awarded, that every person is certiorated off the debtor's bankruptcy¹.

The doctrine now laid down is clear in the case where a party buys up, at an under value, notes payable to the bearer, issued by a bank that has afterwards become bankrupt, in order to found a counter claim on them. In England, where the right of set-off was originally founded on statute, which limited it to mutual credit given, or mutual debts contracted before bankruptcy²; or, according to a later enactment³, two months before the commission was issued, provided the party claiming the set-off did not then know of the bankruptcy, it was decided, under the first of these statutes⁴, that set-off could not be claimed on the bankrupt's cash-notes payable to bearer, unless the holder *proved* that they came into his hands before the bankruptcy. This decision proceeded on the words of the statute. In another case⁵, where a person who had bought goods from another, on a promise to pay in cash, paid them, after the seller's bankruptcy, partly by a bill accepted by the latter, which had been indorsed to him, the Court of Common Pleas sustained the payment, both on the ground that the bill had been taken by the bankrupt's brother, and retained by the bankrupt, and also on the ground of set-off. There was no evidence as to the time when the bill had been acquired by the purchaser. But the last English bankrupt statute, 6 Geo. IV. c. 16, § 47, enacts, that "every person with whom any bankrupt shall have really and *bona fide* contracted any debt or demand before the issuing the commission against him, shall, notwithstanding any prior act of bankruptcy committed by such bankrupt, be admitted to prove the same," provided he had not notice of an act of bankruptcy at the time of its contraction, and by § 50, that mutual credit or set-off may take place, "notwithstanding any prior act of bankruptcy committed by such bankrupt before the credit given to, or the debt contracted by him," and the balance only which is due on either side "shall be claimed or paid on either side respectively; and every debt or demand hereby made, proveable against the estate of the bankrupt,

¹ 2 Bell, 130.

² 46 Geo. III. c. 135, § 3.

³ Mayer v. Nias, 8 Moore, 275.

⁴ 5 Geo. II. c. 30, § 8.

⁵ Dickson v. Evans, 6 T. R. 57.

"may also be set off in manner foresaid against such estate," provided that the person claiming set-off had not, when credit was given, notice of any act of bankruptcy. All grounds of set-off, therefore, are good, which arise before the issuing of the commission, unless the party had notice of an act of bankruptcy. In Scotland, where there is no statutory rule, the presumption would be in favour of all such claims, as well as of every claim on bills or notes payable to the bearer, or blank indorsed, unless it was proved that the holder acquired them while in knowledge of the bankruptcy.

The doctrine now laid down is applicable in all cases where a debtor acquires a claim against his creditor, after knowing of his bankruptcy, for the sole purpose of founding compensation or retention. For example, it has been decided, that one member of a company taking an indorsation from the company to a bill, after he knew that the granter was insolvent, could not plead compensation on it against a claim of rent previously due by him to the granter¹. The principle on which this case is said to have been decided, is applicable to this whole class of cases, viz. "that if the debtors of persons insolvent were to be permitted thus to avail themselves of assignments obtained from particular creditors, it would be easy to dis-appoint the remainder of them of that rateable and just payment of debt to which they are entitled."

It has been held², that a prescribed account which was not proved by the alleged debtor's writ or oath, could not be pleaded in compensation of a bill. The same rule would apply to a plea of compensation, founded on a prescribed bill. But, if the debt is instructed by the debtor's writ or oath, it seems to afford ground for compensation or retention.

It has been already mentioned³, that retention may be pleaded in case of bankruptcy, to secure future and contingent, as well as present claims. The law of set-off in England depends now on the statute already cited⁴, 6 Geo. IV. c. 17, § 47 and 50, according to which set-off is allowed, where mutual credit has been given before the issuing of a commission of bankruptcy, and which has thus superseded various

¹ *Cauvin v. Robertson*, 19th June 1783, *Morr.* 2581.

² *Clark v. Buchanan*, 6th August 1773, *Morr.* 2664.

³ *Antea*, 829.

⁴ *Antea*, 836.

anomalies that arose under the previous enactments¹. In Scotland, where retention is a right at common law, it is sufficient, whether there has been mutual credit before the bankruptcy or not, that a person should, at the time of exercising it, have any claim, however distant or contingent, against the other party. It has been decided, for instance, that even the plea of compensation might be elided by retention in security of such a claim²; so that the debtor in a bond was excluded from pleading compensation on a bill due to him by the charger, by the right of the latter to retain the bill-debt till he was relieved from a cautionary obligation which he had contracted for the other party. It follows, that the drawer or indorser of a bill or note, the former of whom, with reference to the acceptor or granter, drawer or prior indorser, and the latter, with reference to the acceptor, is a cautioner, as well as any obligant on the bill or note, who is truly a cautioner, as to other parties, may retain any right or fund in his possession belonging to such parties, or any debt due by him to them in security of his claim of relief, though the holder of the bill or note has not yet made a claim on him.

The application of this doctrine to such claims, on accommodation bills and notes, shall be considered in connection with what is now to be explained as to cross-bills.

It has been shewn that, in Scotland, any party to a bill or note, who, though directly bound to the holder, is a surety as to another party, has a right, as surety, to claim on that party's estate, either on paying the bill or note to the holder, or for the surplus dividends accruing to it from that estate, after the holder's claim has been satisfied; and he has also a right of retention, as now explained. Cross bills or notes are not therefore indispensable in Scotland to secure relief to such a party, either by ranking or retention; nor, indeed, are they necessary in England, since the 49 Geo. III. c. 121, § 8, (which is repeated by 6 Geo. IV. c. 16, § 52,) to enable him to rank on the estate of the person accommodated, as these enactments authorise any person who has become bound

¹ A short statement of the leading points decided under these enactments, was given in the former edition; but it is now expunged as unnecessary.

² *Irvine v. Mensies*, 10th July 1711, *Morr.* 2686. *Vide* also to the same effect *Brough's Creditors v. Jollie*, 26th Nov. 1793, *Morr.* 2585.

as surety for another, to stand in place of the principal creditor, if he has proved the debt, so far as he has paid it or any part thereof, or, if the creditor has not proved, to prove his own demand in respect of such payment directly against the principal debtor's estate. Cross-bills, however, are useful as affording a direct ground of claim, which cannot be redargued, unless by instructing, in Scotland, by his writ or oath, that no value was given for them. These documents are either granted in exchange for each other, as when two parties accept bills or grant notes reciprocally for each other's accommodation, on the understanding that each party is to retire his own note or acceptance, or when a party, who has signed a bill or note for another person's accommodation, gets from him what is called an indemnity-bill or note, not to accommodate him, (although he may circulate it, if granted to him without restriction,) but on which he may claim for relief, if he is obliged to pay the other bill or note. Bills or notes granted by third parties to the party accommodated, and only transferred by him, may be thus employed¹. - The party receiving them is not an onerous holder, except in so far as he has given value for it in the bill or note exchanged for it². But the presumption of full value given by the holder of every bill or note cannot, as already explained, be redargued in Scotland, and cannot even be restricted to the effect now mentioned, except by the holder's oath or writ. His books will, in general, afford the best evidence of the real transaction. It is not indispensable to such a course of dealing, that, for each bill or note, there should be a counter bill or note corresponding with it in amount, date, term of payment, and every thing else³. But their discrepancy, in any of these

¹ In *ex parte* Clanricarde, Cooke, B. L. 182, there were documents of this kind on both sides. *Vide* also *Buckler v. Buttivant*, note 3.

² *Ex parte* Beaufay, Cooke, 180.

³ *Vide ex parte* Maydwell, Cooke, B. L. 180. In *Buckler v. Buttivant*, 3 East. 72, certain bills were held to be given in exchange for each other, although one of them differed a few shillings from the amount of the counter bill; although another corresponded in amount, not with any one counter bill, but with two bills taken together; and though there was a difference of five shillings between the opposite sides of the account; which sum, however, was paid at the time, as was said, to finish the transaction. There was also a difference of a few days between the periods when some of the counter bills respectively fell due. But the account, as contained in the books of the parties, shewed that none of

respects, will be a circumstance to prove that they were not granted in exchange for each other¹; and strong contrary evidence, as entries in the books of the parties, or a written agreement between them to grant such accommodations, or stipulations that each party should pay his own acceptances², or letters, shewing that the bills were granted for each other, will be required to shew, either that they were truly exchanged³, or that one of the parties got the bills which he holds merely to secure his relief. When one or other of these facts is established, the right of either party must depend on the fulfilment of his obligation under the counter bill or note, since it is the only value that he gave. If neither party negotiates the documents, no claim can be made on either of them, as they neutralise each other. If one of them is transferred to a third party, the original party who retains the other cannot claim on it, except in so far as he pays the counter document. If both are negotiated, each party must retire the document for which he was properly bound; and the mutual obligations will thus be extinguished. When each party is acceptor or granter of the bill or note which he has bound himself to retire, the possession, by each, of his own note or acceptance, will be sufficient to shew that the transaction is closed. But if the other party is acceptor or granter, and the real debtor's obligation is contained in a separate missive, the acceptor or granter, being primary obligant *ex facie* of the bill or note, ought, for his own safety, to get possession of it, and is thereupon bound to grant an acknowledgment that it was paid by the other party, which will prove the implement of his obligation.

These rules, which have been stated on the supposition of each party continuing solvent, are also applicable, under some modifications, on the bankruptcy of both or either of them.

In England, the original doctrine as to all cross-bills appears to have been, that each bill constituted an absolute debt from the time of granting it; and that, therefore, each party

the bills had been granted for any other consideration but for each other, and the correspondence between the parties proved that they were mutual accommodations.

¹ Bayley, 430.

² Cowley v. Dunlop, 7 T. R. 565.

³ *Vide* Buckler v. Buttivant, 764, note 3.

was entitled to prove against the other party's estate, on the bill which he held, whether he had fulfilled his obligations on the other or not¹. Accordingly, the holder of each bill was allowed to prove for it under the debtor's commission of bankruptcy, even though he had not been required to pay the other bill². This could only have been allowed on the supposition of each bill being an absolute debt before the bankruptcy; because, otherwise, it would have resolved into an ordinary contingent debt, which, till the 49 Geo. III. c. 121, could not, in any case, be proved under the commission. But, at last, the Court of Chancery exerted its equitable powers in determining, that, though the holder of such a bill or note might prove, the dividends set apart for him must be suspended till he discharged his obligations on the counter document³. It has been doubted⁴, whether such bills can even be proved till the counter bills have been retired; and it has been remarked⁵, that, if they may be proved, and a dividend set apart for them, on the ground of their forming an absolute debt, on the same ground the dividend ought to be paid, whether the counter document has been retired or not. But the later authorities seem to lead to the result, that they may be proved, although the dividends on them will be suspended⁶.

In Scotland we have escaped from these difficulties, by con-

¹ Cullen, 133-4. This doctrine is implied in *Rolfe v. Caslon*, 2 H. Bl. 570, and *Cowley v. Dunlop*, 7 T. R. 565.

² *Ex parte Maydwell*, Cooke, 180; *ex parte Bloxham*, 8 Ves. 231.

³ *Ex parte Bloxham*; note 2; Cullen, 134; Bayley, 424-5. The same principle was applied in *Sarratt v. Austin*, 4 Taunt. 204, where it was held, that the claim on such a document, being neither an absolute debt nor a future debt, under the 7 Geo. I. c. 31, but altogether a contingent debt, could not support a petition for a commission of bankruptcy. The authority of this case was recognised in *Solarte ex parte*, 2 D. and Ch. 261, where it was decided, that the assignees of a party who had got a third party's acceptances from a house, (the drawer's,) in return for acceptances of his to them, which were not fully paid, though a composition on them was drawn from his estate, could not prove on the acceptances which he held against the estate of the drawers. As the bills which formed the consideration for giving these acceptances had been ranked on the same estate, it was held, that, to rank them also on it, while the counter acceptances were unpaid, would have been to rank the same debt twice.

⁴ Cooke, 183. *Vide* also three cases to the same effect, cited *ibid.* viz. *ex parte Curtis*, *ex parte Lee*, and *ex parte Brown*. The last case, and two other cases to the same effect, viz. *ex parte Everett*, and *ex parte Ward*, are also cited in *Sarratt v. Austin*, 4 Taunt. 204.

⁵ Cullen, 134, note 48

⁶ *Vide* note 3.

sidering such securities from the first as contingent debts, depending each on payment of the other, but allowing them, like other contingent debts, to be ranked and to have dividends set apart for them, though not to be paid till the condition becomes absolute. The holder of such a security, if he has indorsed it to a third party, seems entitled to retain any debts due by him to the other party, till he is relieved from his liability on the bill or note thus indorsed, which the other party is bound to retire. Some difficulties, however, have arisen in the application of these simple principles; and the decisions in the few cases which have occurred, as they proceeded on separate grounds, can scarcely be said to have established any fixed rule.

In the first case¹, bills accepted by one party for another party's accommodation, had been transferred by the latter to third parties, and the acceptor, on the other hand, retained counter notes, which the other party had granted to him, in his own possession. These notes, therefore, while in his hands, were merely securities for his relief from his own acceptances. Although they appeared to relate to a separate debt, they did in fact relate to the same debt, and could have no more effect in the holder's favour, with reference to it, than a simple letter of relief to him from the other party. Such a letter could not have given him a claim against the other party, unless so far as he paid the debt; and, on the other party's bankruptcy, and the holder of the negotiated bills ranking for their full amount on his estate, no such misgiving, whether in the form of a counter note or a letter of relief, could entitle him, as mere surety, to rank again for the same debt. But the decision seems to have involved this principle of double ranking. Laidlaw, one of the parties, had accepted bills for the accommodation of Forrester and Company, who, on the other hand, granted him their promissory-notes for the same sums. Both parties failed, Forrester and Company having previously indorsed away Laidlaw's acceptances for value, but Laidlaw retaining their notes. The holders of the acceptances ranked for their amount on Laidlaw's estate, from which they drew 10s. *per*

¹ Nairne v. Cranstoun, 13th May 1796, Morr. 2597.

pound, and also on the estate of Forrester and Company, from which it was supposed that they would draw 5s. more. On the other hand, Laidlaw's trustee having claimed to be ranked on Forrester and Company's estate for their promissory-notes, it was objected, that Forrester and Company, having already ranked the holder of the bills, as principal creditor, for their full amount, could not be bound to rank Laidlaw, who was merely surety, a second time for the same debt: the notes, it was said, being only obligations of relief to him for that debt, though apparently distinct documents. On these grounds, Forrester and Company's trustee pleaded that they were entitled to retain the dividends corresponding to the promissory-notes, unless Laidlaw's trustee relieved their estate altogether from the ranking on his acceptances, by paying their full amount, in which case he would be entitled to rank as surety in place of the holders of these acceptances. But the Court of Session decided that the notes must be ranked for their full amount. The soundness of this decision has been questioned by some of the Court in a recent case¹, as well as by a learned author², and it appears to be extremely doubtful. If the promissory-notes related to the same debt with Laidlaw's acceptances, and formed merely an obligation to relieve him from them, his trustee could not rank on them, more than on a clause of relief on a bond, in his right as surety, while the holder of the bills was ranked on the same estate for the same debt as principal creditor. It was said, that, if the notes were not ranked, Forrester and Company's estate, having drawn full value for the bills, would profit to the extent of 10s. *per* pound, received by the holders of the bills from Laidlaw's estate, besides the 5s. *per* pound of shortcoming on their own estate, which was only to pay 5s. *per* pound on the bills; so that thus their estate must have gained 15s. *per* pound by taking Laidlaw's acceptances, without giving value in return. But this argument would have been equally applicable, although Laidlaw, instead of getting the notes, had got merely a counter obligation of relief; in which case he would equally have benefited Forrester and Company's estate,

¹ Newbigging and Company's Trustee v. Heywood, Collins and Company's Trustee, 12th Nov. 1823, 2 S. and D. 481, Fac. Coll.

² 1 Bell, 528.

without receiving ultimately any value in return. The value which he took for the bills, was an obligation of relief, in the form of a promissory-note, which was intended, if both parties had remained solvent, to enable him, on paying the acceptances, to make good his relief to the full amount. But it could not have been meant, as it would have been a fraud on the granter's other creditors, to set up these notes, with a view to his failure, as fictitious securities, under which the holder or his creditors might claim for their full amount on the granter's estate, though they had only paid a small dividend on the acceptances, which formed the consideration for them. As Laidlaw received the notes only as sureties for the acceptances, neither he nor his creditors could rank for them, while the holder of the acceptances ranked for them on the same estate. The only fair result would have been that adopted in England under similar circumstances, viz. that the dividends on the notes from the granter's estate should have been suspended, till Laidlaw's creditors relieved the granter's estate from the bills, in which event his creditors would rank on the notes, as coming in place of the bills.

Another of these cases alluded to ¹, though decided by the Court of Session prior to the case now mentioned, was decided subsequently to it in the House of Lords. In this case, three several houses, M'Alpine and Company in Scotland, and Livesay, Hargrave and Company, and Lewis and Potter, both of London, agreed to exchange bills to support each other's credit. Accordingly, M'Alpine and Company gave bills to both the other houses, drawn by themselves, and accepted, either by some of their correspondents, or by a fictitious firm assumed by themselves. Many of these bills Livesay, Hargrave and Company, and Lewis and Potter indorsed to their bankers, Gibson and Johnson, in security of advances made to them. On the other hand, both these houses, viz. Livesay and Co., and Lewis and Potter, gave M'Alpine and Company a number of bills drawn by them respectively on Gibson and Johnson, by whom they were accepted. But it is a circumstance which has been overlooked, till it was first

¹ Curtis and others v. Chippendale, 9th Dec. 1794, decided by the House of Lords on 23d February 1797, Morr. 2589.

noticed by a late author ¹, that M'Alpine and Company gave either cash or good bills, which were regularly paid, for nearly the full amount of Gibson and Johnson's acceptances which they received ², and that thus they were onerous holders of these acceptances, independently of all claim on the other bills which they had given. In these circumstances, all the four houses already mentioned having become bankrupt, the holders of the bills accepted by Gibson and Johnson, which M'Alpine and Company had received from the two other houses and indorsed away, ranked for them on Gibson and Johnson's estate; and, on the other hand, Gibson and Johnson's assignees claimed on the estate of M'Alpine and Company for those bills which the latter had given to Livesay, Hargrave and Company, or Lewis and Potter, and which these two houses had indorsed for value to Gibson and Johnson. But the holders of Gibson and Johnson's acceptances, besides ranking on their estate as acceptors, had likewise ranked for them on the estate of M'Alpine and Company as indorsers; and, therefore, the trustee of M'Alpine and Company pleaded retention of the dividends claimed by Gibson and Johnson's assignees on their bills, in order to relieve M'Alpine and Company's estate from the dividend with which they were burdened for Gibson and Johnson's acceptances, and for which the latter were the proper debtors. The majority of the Court of Session sustained this plea of retention, holding that, with reference to Gibson and Johnson's acceptances, M'Alpine and Company were in the condition of cautioners, and were thus entitled to make good their claim of relief from these acceptances, by retaining, in security of it, any debt due by them to the principal debtor. The Court therefore deducted from Gibson and Johnson's claim against M'Alpine and Company's estate, the dividend which the latter had paid on account of the acceptances of the former, and ranked Gibson and Johnson only for the balance. But the House of Lords reversed this judgment, by repelling the plea of retention, and ordering that Gibson and Johnson's assignees

¹ Glen, 2d edition, 369.

² This fact is stated in detail, both in the memorial for M'Alpine and Co.'s Trustee, in the Court of Session, and in his case as respondent in the House of Lords, p. 2, and is not denied by the other parties.

should be ranked for their full claim. It does not appear distinctly on what ground this reversal proceeded; but there were some special pleas in the case which render it not improbable that it proceeded on them, rather than on the general grounds that have been sometimes supposed. One special ground of argument was strongly urged in the appeal, viz. that, as this was a claim between one bankrupt estate in Scotland and another in England, it ought to be regulated by the bankrupt laws of these two countries; that the bankrupt laws of both countries then coincided on this subject, inasmuch as the English bankrupt law excluded all claims which were not due at the time of the act of bankruptcy, and, consequently, excluded this contingent claim by M^cAlpine and Company, while the Scotch bankrupt act, 23 G. III, c. 18, under which the sequestration of M^cAlpine and Company was awarded, declares, § 22, "that the whole estate, whether personal or real, "belonging to the bankrupt at the period of the sequestration, "shall become a fund of division among those who were his "creditors prior to the date of the application, *and none else*, "according to their due order of preference;" and which statute, although it elsewhere, § 34, provides for debts payable after the sequestration, does not include contingent claims. Thus, as was argued, there was no ground for pleading compensation or retention, on the claim of relief in question, against Gibson and Johnson's estate, since it could not be made available against them by the bankrupt law either of Scotland or England. This was the argument urged most strongly by the appellant, and it is not unlikely that it influenced the judgment, more especially as that judgment is not proved to have proceeded on any of the reasons generally assigned for it. It has been said¹, in explanation of the judgment, that to have allowed M^cAlpine and Company's claim for relief from Gibson and Johnson's acceptances to form a ground of set-off against the claim of the latter, would have been to rank these acceptances twice on their estate, since the holders of the acceptances had already ranked for them. It may, however, be answered, that M^cAlpine and Company did not, by the proceeding in question, *rank* on Gibson and Johnson's estate, but merely exercised a

¹ 1 Bell, 530.

right of retention over a debt which they themselves owed to these parties, in order to secure their claim of relief. There could not, indeed, have been room for retention, if M'Alpine and Company had, as has been supposed, merely received Gibson and Johnson's acceptances from Livesay, Hargrave and Company, in exchange for their own bills, under the agreement for mutual accommodations. They might, no doubt, have pleaded their claim of indemnity as a ground for withholding payment of their own bills, while in the hands of Livesay, Hargrave and Company; because these bills, so long as Livesay, Hargrave and Company retained them, were merely guarantees of their relief from their own counter acceptances, and could not, therefore, be so employed by them till they had retired these acceptances. But, when these bills were indorsed by Livesay, Hargrave and Company for value, they became to the holders vouchers of debt independent of the counter bills; and, as they were granted at first, as well as these counter bills, for the purpose of being negotiated, it was part of the original agreement that each party should retire his own bills from the holders, without reference to the counter bills. This obligation was in part discharged as to the bills given by Livesay, Hargrave and Company, by ranking them on the estate of Gibson and Johnson, the acceptors. But they were also ranked on the estate of M'Alpine and Company, as indorsers; and the question was, what claim of relief M'Alpine and Company had for this payment. Now, they could have no such claim, except in so far as they had got the bills onerously; and, if they had acquired them only in consideration of their own counter bills, their right could not be onerous, till they fulfilled the condition on which the bills were obtained, by paying a dividend on their own bills, which had been given as a consideration for them. They could not, therefore, on the supposition now stated, have withheld the dividends on their own bills from Gibson and Johnson, to secure their relief from Gibson and Johnson's acceptances, because it was only on paying these dividends that they became onerous holders of Gibson and Johnson's acceptances, so as to acquire such a right of relief. The observations, therefore, of a learned author¹ on this sub-

¹ 1 Bell, 530-1.

ject would be well founded, if M^cAlpine and Company had given no value for Gibson and Johnson's acceptances received by them from the London houses, excepting their own counter acceptances. But it has been shewn, that they had given full value for most of Gibson and Johnson's acceptances in cash and good bills, independently altogether of their own counter bills; and, as their estate had paid a dividend on these acceptances, for which the acceptors were properly liable, it would appear that, when the latter claimed dividends from them on any other bills, they were entitled to retain these dividends in security of their relief for what they had thus paid. This was not to rank again on Gibson and Johnson's estate, but to use a security which was in their own hands. The preference which it gave them over the other creditors did not afford an argument against it more than against any other preferable security. It seems to have been merely an example of that right of retention which every cautioner may employ for his own relief; and, therefore, if the question had been tried at present, on general principles, instead of being influenced by the peculiar terms of the 23 G. III, combined with the English bankrupt law, it would perhaps have had a different issue. These remarks, however, are proposed with the greatest diffidence, considering the different construction which has been hitherto given to the ultimate judgment in this case.

From what has been already stated, it appears, that, so long as a party receiving one bill in consideration of another keeps it in his own hands, there is no difference between his claim on it, and the claim of relief which he would have, at any rate, as surety, on being obliged to take up the other bill, except, that the counter bill supersedes other proof of his claim of relief under the other bill. This appears to be the case, even when bills are given expressly in exchange for each other. But, if each party, without an exchange, express or implied, merely gives to the other a number of bills for his behoof, which are entered to their respective accounts, and one party negotiates the bills given him, while the other retains a number of his, the latter cannot use the retained bills even as a constitution of his claim of relief from the negotiated bills, but must claim on these last bills merely as surety; the respective sets of bills not being then considerations for each other, but

each party being only surety on the bills which he gives, and entitled to claim as such. In a case of this kind, where one party negotiated almost all the bills that he got from the other, which, accordingly, were afterwards ranked on the estates of both parties, while the other party retained a number of the bills that he had received, he was not allowed to rank on them against the other party's estate, even to the effect of making good the loss that his estate had incurred by receiving much less accommodation than it gave, but his claim was held to be merely one of suretyship on his bills given to the other party: and it was decided, that even for this claim he could not rank on the other party's estate, unless he had satisfied the whole of these bills, as the holders had been already ranked on them against both estates¹. This decision was given before the 49 Geo. III. c. 21, § 8, repeated by 6 Geo. IV. c. 16, § 52, which allow sureties to rank for relief against their principal's estate. But, besides, these acts apply only where the surety has paid the whole debt, or a part in discharge of the whole, in which case the principal creditor can only rank for the balance. They do not authorise the surety to rank when the creditor has merely drawn a dividend from his estate, while he has ranked separately against the principal debtor's estate for the whole debt; for this would be to allow a double ranking². The principles of this decision are therefore the same that would be adopted in Scotland. In such a case, in adjusting accounts between the parties, the bad bills on either side must be thrown out of view, because these resolve on both sides into cautionary obligations, which cannot be ranked against either estate, so long as the principal debts are ranked. In a later case³, indeed, it was held by the highest authority, that, if there is a surplus on one of the estates, after paying all the bills ranked against it, the other estate may rank on that surplus for the cross-bills ranked on it, so far as

¹ *Ex parte Walker*, 4 Ves. 373; *Cooke*, B. L. 184. *Vide also Bayley*, 432-3, who elicits the true principles of this intricate case. I have conceived it to be better to state its general result than its details, because nothing but an imperfect statement of them could be given within moderate limits. A similar decision was given, under like circumstances, in *ex parte Earle*, 5 Ves. 833, and in *Solarte ex parte*, 2 D. and Ch. 261.

² *Bayley*, 433.

Rawson ex parte, per Lord Eldon, Chancellor, 1 Jac. C. C. 279.

the sum exacted from it on account of them has exceeded the sum paid on account of the corresponding bills from the other estate. In two later cases, also, this doctrine was recognised¹. But, if there is no surplus, the balance proveable by one party against the other can only be struck on an account of the cash or good bills given. This rule was adopted in another case², where, in estimating the cash-balance between two estates, £.1098 of bills given to one party by the other, which had turned out bad, were struck out of the account. But, as these bills were entirely for the accommodation of the party in whose favour the cash-balance stood, so that he was bound to retire them, instead of doing which he had allowed them to be ranked for a dividend on the other party's estate, that estate was authorised to retain the dividend on the cash-balance due by it in relief of these dividends³. When bills are accepted to a party

¹ *La Forest ex parte*, 2 D. and Ch. 199; also in *Solarte ex parte*, 3 D. and Ch. 416, 1 Mont. and Ayr. 270, where it was decided that the assignees of parties who had got acceptances of third parties from the drawers, in consideration of their acceptances to the latter, were entitled, though their acceptances had not been fully paid, but had been ranked on the estates of all the parties, to rank the acceptances in their hands on the estate of the acceptors, but retaining the dividends till the counter-acceptances were fully paid, that their estate might be indemnified from these dividends, for a surplus of the payment from their estate over the payments from the other estates.

² *Ex parte Metcalf*, 11 Ves. 404.

³ *Ibid.* *Vide* also Bayley, 353-4. Professor Christian suggests, (ii. 393,) that the retention on the dividend of the cash-balance in this case would be ineffectual; because, after it was retained, it would fall to be divided among the holders of the very bills against which it was meant to indemnify the estate, as well as among the other creditors. His solution of the case is, 1st, That the bills for £.1098, so far as they corresponded with the cash-balance, should have been considered as granted in discharge of it; so that, as the party receiving them had indorsed them for value given for them from a third party, the ranking of these bills by the holder on the drawer's estate ought to have been held equivalent to his author's ranking for the cash-balance, and should therefore have discharged his claim for that balance. 2dly, He suggests, that, in so far as the bills exceeded the cash-balance, the drawer should have been considered as cautioner for the party receiving them, and should therefore have had a claim against him in his character for any dividend which he had paid. Such a claim in Scotland would be extinguished by a discharge under the sequestration. This solution proceeds on the *hypothesis*, that the bills had not been granted altogether for the receiver's accommodation, but in extinction of the cash-balance, so far as this balance corresponded with them.

In *ex parte Walker*, 774, note 1, a cash-balance was allowed to be ranked, without setting it aside to answer the dividends paid on bills received by the party

either expressly or by implication, on account of a cash-balance due to him, and these bills, having been indorsed away, are ranked by the holders on the acceptor's estate, it has been held that the indorser cannot rank on the same estate for his cash balance, because that would be to rank him twice for the same debt, as the bills, for which he has got value, are ranked in his right¹.

It has been mentioned, that, when bills on opposite sides of an account differ in amount or other particulars, they will not be presumed, without strong additional evidence, to have been given for each other. The Court of Session proceeded on this principle, in holding that bills which differed from each other in various particulars, although entered on opposite sides of an account between the parties respectively granting them, could not be held as considerations for each other², and that, therefore, although one of the parties had paid the full balance due on the one set of bills, he could not claim, for his relief from that balance, on the other bills which were in his possession retired. One of these bills thus retired was a bill for £.1500, in which the other party, being acceptors,

in whose favour the balance stood, and which that party was bound to have retired. But the other party had received counter accommodations to a much greater amount, which had been also ranked on the estate of the party granting them, and therefore the one much more than counterbalanced the other. The account on which the cash-balance arose was distinct from the account of these mutual accommodations, being composed, not of them, but either of advances in cash, or of such bills as were duly honoured. The bills in question, therefore, did not form any part of the consideration given for this cash-balance, since they did not enter into the account on which it arose, but were inserted in a separate account. Hence there does not seem to be good ground for the objection which has been stated to this judgment, 2 Christian, 389-90, viz. that, to allow the cash-balance to be proved, was to allow a proof, both of the bills in question and of the consideration given for them. No doubt, the objection stated by the learned author would be unanswerable, if the bills in question had been granted, not as mutual accommodations, entered in a distinct account, but in consideration of money due by the party granting to the party receiving them; for, in that case, it would be unjust, that, while third parties holding these bills, ranked for them on the estate of the party granting them, the original receiver of them should also rank for his cash-balance, which had been *pro tanto* discharged by his receiving these very bills. But what has been now stated appears to shew that this was not the case.

¹ Read *ex parte*, 1 Gl. and Jam. 224.

² Newbigging and Company's Trustee v. Heywood, Collins and Co.'s Trustee, 12th Nov. 1823; 2 S. and D. 481, F. C. Session Papers.

were *ex facie* primary obligants, though it was really granted for the accommodation of the party receiving it; and, though he had acknowledged this by a counter-missive, in which he engaged to furnish funds for retiring it, he pleaded that this was merely an obligation of relief, which could not be allowed to qualify the *prima facie* liability of the acceptors, till they performed their counter obligations to him, by indemnifying him for his payments on account of their bills. But the successful answer was, that he had performed the obligation, of which he now wished to suspend the performance, by retiring the bill; and that, being thus extinguished by the proper debtor, it could not be revived to any effect whatever.

When a person, though he has none of the drawer's effects in his hands, accepts a bill, not on his account, but on account of a third party who has got value from him, the acceptance is not considered as one for the drawer's accommodation, but he holds it onerously, and has the same claim on it, against the acceptor or his estate, that he would have had against the party on whose account it was made, and in whose situation the acceptor has thus placed himself¹.

A bankrupt under sequestration may be discharged in Scotland from all claims, either certain or contingent, arising from obligations contracted prior to the sequestration, whether ranked under the sequestration or not. Such a discharge is granted by authority of the Court, either on a contract by the bankrupt to pay a certain composition approved of by nine-tenths of the creditors in number and value who have claimed, when proposed at the time and in the manner specified in the statute², or, failing that, by his whole creditors; or, without such a composition, on an application made by the bankrupt, after a certain time, with concurrence of the trustee and four-fifths of the creditors in number and value³. But the debtor may, notwithstanding such a discharge of his debts, revive any of them by subscribing a bill or note for its amount⁴. A discharge granted to a company as indorsers of a bill, and to the individual partners, cannot release

¹ *Ex parte* Marshall, 1 Atk. 131, *per* Lord Hardwicke; *ex parte* Matthews, 6 Ves. 385, Bayley, 354.

² 54 Geo. III. c. 137, § 59, 60.

³ *Ibid.* § 61.

⁴ *Hunter v. Lindsay*, 31st Jan. 1835, 13 S. D. B. 390.

one of these partners, who was also partner of a company that had accepted the bill, from his obligation as an individual partner of the acceptors¹.

Failing a discharge, the bankrupt can only have the privilege of *cessio bonorum*, which does not discharge him from his debts, but merely releases him from personal diligence, on his surrendering all his effects to his creditors. To bankrupts who are not or cannot be sequestrated, this is the only remedy which the law allows, except the voluntary and individual discharge of each creditor.

A decree of *cessio* cannot be effectual to the debtor against the holder of a bill of his, who has not been cited, though the bill did not fall due till after the cause had been called, and though the debtor did not know that the bill was in the hands of the actual holder, till he received a charge from him, which was also after the cause had been in Court².

As to the effect of a discharge obtained by a bankrupt in one country, in releasing him from bills or notes for which he is liable to persons residing in a different country, the same doctrine seems to apply, concerning this mode of releasing bills or notes as well as other contracts, which has been already stated with regard to their execution³ and extinction by prescription⁴, viz. that it must depend on the law of the country where the bill or note is made payable, since it is that which the parties are presumed to have in view. In illustration of this principle, cases have been already cited⁵, and others are now referred to, in which it was held, on the one hand, that a discharge granted to the bankrupt, in the place of payment or performance, is a complete release of the debt⁶, and, on the other hand, that it cannot be so when granted in a different country from the place of payment or performance⁷. The extent and effect of a discharge or certificate

¹ Sharpe v. Simson, 11th July 1829, 7 S. and D. 901.

² Veitch v. Campbell and Co., 28th Nov. 1821, 1 S. and B. 173.

³ *Antea*, 156-7.

⁴ *Antea*, 660.

⁵ *Antea*, 156-7, and 660.

⁶ Ballantyne v. Golding, Cooke, 487.

⁷ This doctrine was recognised, though it was not the ground of decision, in *Quin v. Keefe*, 2 H. Bl. 554; and was expressly ruled in *Lewis v. Owen*, 4 B. and A. 654; the Court of King's Bench holding that the plaintiff was entitled to sue the defendant on bills accepted for his behoof, and paid in Eng-

must be determined by the law of the country in which it is granted¹.

land, though he resided in Ireland at the time of drawing them, and had since got a certificate there. The debt, it was said, must be held to arise in the place where the bills *were paid*.

¹ This doctrine was laid down by Lord Chancellor Hardwicke, in *ex parte* Burton, 1 Atk. 255, as to the effect of a decree of *cessio bonorum* obtained in Holland.



ADDENDA ET CORRIGENDA.

Page 12, note 3. After the case of *Mosely v. Hanford*, 10 B. and Cr. 729, add—*Foster v. Jolly*, 5 Tyrwh. 239, where it was held, that the agreement in the note could not be contradicted by parole evidence, but that the consideration might be disproved by such evidence. On this last point *vide* also *Solly v. Hinds*, 4 Tyrwh. 305.

Page 20, note 4, add—The same doctrine is held in England; *Heydon v. Thompson*, 3 Nev. and Mann. 324.

Page 28, after note 2, add, as note 2 *b*—*Firbank v. Bell*, 1 B. and Al. 36; *Butts v. Swan*, 2 Br. and Bing. 78; *Emly v. Collins*, 6 M. and S. 144.

Page 33, line 9. from the bottom, immediately after the word “ authority,” add—A promissory-note, payable to a certain person on demand, falls under class 2, though not presented for more than two months after its date; *Leith Bank v. Walker’s Trustees*, 22d Jan. 1836, 14 S. D. B. 332, F. C.

Same page, to note 1, add—*Dixon v. Chambers*, 1 Cr. M. and R. 845.

Page 35, line 8. from the top, after the word “ required,” add as a note—*M’Intosh*, 13th May 1830, 8 S. D. B. 739.

Same page, line 9. from the top, after the words “ shall pay,” add—Or saying, “ I promise to pay,” or “ cause to be paid¹,” or promising “ to pay L.16 by giving up clothes and papers².”

Same page, line 7. from the foot, delete the word “ and;” and line 6. from the foot, after the words “ receipt stamp,” add—and as to a letter promising to pay L.200, which, having reference to a past-due bill by another party for L.350, was held to be a letter of guarantee; *Thomson v. Gilkison*, 1st March 1831, 9 S. D. B. 520.

Page 38, note 1, add—There is a later statute, 3 and 4 Will. IV. c. 97, § 17, requiring, in the event of new dies being fixed on by

¹ *Lovell v. Hill*, 6 C. & Pay. 238.

² *Dixon v. Nuttall*, 6 C. & Pay. 320.

Page 297, note 6, at the beginning, add—*Wyllie v. Paton's Representatives*, 26th Nov. 1830, 9 S. D. B. 84.

Page 338, line 9. from the foot, add to note 4,—*Forbes*, 63, notice a case, where a written promise to accept for L.100 was found to subject the party in a bill drawn for that amount; but the defender is not said to have been sued as acceptor of the bill; *Berthal and Watson v. Henderson*, 9th Jan. 1702. He also, 140, mentions another case, *Maxwell v. Mackay*, where a seller making a conditional promise to accept, was found not to afford warrant for a summary charge as an acceptance, though the charge was converted into a libel or ordinary action.

Page 400, line 6. from the foot, after the words "had retired," add—It has been decided, that a banker's check in favour of a party, not proved to have been presented, does not instruct the debt for which it was granted, but rather proves payment, unless it was presented and refused; *Pearse v. Davis*, 1 M. and Rob. 365.

Page 417, line 20. from the top, after the words "term of payment," add—It has been found to be the practice in London, when a bill is left for acceptance, to give it back accepted to any person who calls for it, and describes any private mark or number on it; and it has been held, that, if a stranger is enabled to procure it by discovering the private mark and number without the acceptor's fault, the latter is not liable; *Morrison v. Buchannan*, 6 C. and Pay. 18.

Page 577, line first, after the word "property," add—Even though the bill has not been protested or registered; *Ferguson v. Robertson*, 20th Feb. 1816, F. C.

Page 658, line 4. from foot, after the word "statute," subjoin, in note, (*) *Armstrong v. Johnstone*, 16th May 1804, *Morr.* 11148.

Page 662, line 13. from the foot, after the words, "statute of limitations," add—It has been also decided recently¹, that the six annual prescription did not apply to a bill accepted and made payable in France, though the acceptor was afterwards, during the currency of the prescription, domiciled in Scotland, but that the French prescription applied. Decree, however, having been pronounced for the debt in France after the acceptor had left it, the Court, on an action brought to enforce it, decided that it must be opened up, and the defender heard on the merits of the case.

¹ *Lipmann v. Don*, 20th Jan. 1836, 14 S. D. B. 241.

APPENDIX.

No. I.

FORMS OF BILLS AND PROMISSORY-NOTES.

FOREIGN BILL.

London, 1st January 1835.

Exchange for 10,000 Livres Tournoises.

At two usances, (or at sight, or on demand, or after sight, or at after date,) Pay this my first bill of exchange, (second and third of the same tenor and date not paid,) at your place of business, Street, Paris, to Messrs C. or order, (or bearer,) Ten Thousand Livres Tournoises, at sterling *per* Livre, value received of them; and place the same to account, as *per* advice, (or with or without farther advice,) from

*To B, Merchant }
in Paris. }*

A.
B.

(Indorsement.)

Pay the contents to or order,

C.

Or the payee's signature alone may be indorsed.

INLAND BILL.

L.50.

Edinburgh, 1st January 1835.

Three months after date, (or after sight, or at sight, or on demand,) Pay to me, or order, (or to or order, or to bearer,) at the Royal Exchange Coffeehouse here, the sum of Fifty Pounds sterling, value received.

*To B. C., Merchant }
in Edinburgh. }*

A.
B. C.

Indorsements the same as on a foreign bill.

BILL PAYABLE BY INSTALMENTS.

L.500.

Edinburgh, 1st January 1834.

At three, six, and nine months after date, by equal instalments, Pay to me, or my order, (or to or order, or to bearer,) at your warehouse in Street, Edinburgh, the sum of Five Hundred Pounds sterling, for value received.

*To Mr D. E, Merchant }
in Edinburgh. }*

A. B.
D. E.

PROMISSORY-NOTE.

L.100.

Edinburgh, 2d February 1835.

One day after date, (or on demand, or at the term of Whitsunday next,) I promise to pay to A, or order, within the Royal Exchange Coffeehouse here, the sum of One Hundred Pounds sterling, value received.

A.

Indorsements as in bills.

LETTER OF CREDIT by a Bank on their Branch or Correspondent as referred to on page 28. of the Treatise.

SIR,

Edinburgh,

1835.

You will please to honour the drafts of to the extent
of on account of the Bank. I am,
Sir, your most obedient servant,

*To , the Agent for }
the Bank. }*

No. II.

PROTESTS, AND ACTS OF HONOUR.

PROTEST OF A BILL FOR NON-ACCEPTANCE.

L.100 Sterling.

Edinburgh, 12th May 1834.

Three days after sight, Pay to B. or order, at the Royal Exchange Coffeehouse here, the sum of One Hundred Pounds sterling, for value of

*(Addressed) To C, Merchant }
in Edinburgh. }*

(Signed) A.

(Indorsed thus :) Pay the contents to D, or order.

(Signed) B.

At Edinburgh, the twentieth day of May, One thousand eight hundred and thirty-four years.

The principal bill above copied was, in the personal presence of the above-named C, duly protested by me, notary-public subscribing, at the instance of D, merchant in Edinburgh, the last indorsee, not only against the said C, on whom the same is drawn for non-acceptance, but also against the drawers and indorsers, jointly and severally, for recourse, and against all concerned, for interest, damages, and expenses, (or in case of a bill payable at a different place or country from that where it was drawn, for exchange, re-exchange, interest, damages, and expenses,) as accords; in presence of E. and F, witnesses specially called to the premises.

Attestor,
G., N. P.

PROTEST OF THE FOREGOING BILL FOR NON-PAYMENT.

(Prefix copy of the bill as before.)

At Edinburgh, the twenty-sixth day of May, One thousand eight hundred and thirty-four years.

Which day, I, notary-public subscribing, at the request of the above named indorsee D, passed to the Royal-Exchange Coffeehouse of Edinburgh, where the principal bill above copied is payable, and there, after exhibiting and reading over the same, I represented that it had now become due since the date of the protest taken thereupon for non-acceptance on the 20th current, and demanded payment of the contents thereof; which demand not being complied with, I duly protested the said bill at the instance of the said indorsee, not only against the said C, for not-payment of the contents, but also against the drawers and indorsers, jointly and severally, for recourse, and against all concerned for interest, damages and expenses, (or for exchange, re-exchange, interest, damages and expenses,) as accords, in presence of, &c.

PROTEST for NON-ACCEPTANCE and NON-PAYMENT, when the BILL has not been separately presented for non-acceptance.

L. 100.

Edinburgh, 12th May 1834.

Three months after date, Pay to me, or my order, at your warehouse, in Street, Edinburgh, the sum of One Hundred Pounds sterling, for value received.

(Signed) A.

(Addressed) *To C, Merchant* }
 in Edinburgh. }

(Indorsed thus:) Pay the contents to B, or order. (Signed) A.

At Edinburgh, the fifteenth day of August, One thousand eight hundred and thirty-four years.

The principal bill above quoted was, by me, notary-public subscribing, presented to the above-designed C, on whom it was drawn, and acceptance and payment having been refused, it was duly protested at the instance of B, indorsee thereto, against the said C, for non-acceptance and non-payment of the contents, and against the drawer and indorsers jointly and severally for recourse, and against all concerned for interest, damages, and expenses, (or for exchange, re-exchange, interest, damages and expenses,) as accords; in presence of, &c.

PROTEST OF AN ACCEPTED BILL FOR NON-PAYMENT, AGAINST THE
ACCEPTORS, DRAWER, AND INDORSERS.

L.100.

Edinburgh, 12th May 1834.

Three months after date, Pay to B, or order, in the Exchange Coffeehouse here, One Hundred Pounds sterling, for value of

(Signed) A.

(Addressed) *To C, Merchant*
in Edinburgh. }

(Signed) C.

(Indorsed thus:) Pay the contents to D or order.

(Signed) B.

Pay the contents to E or order.

(Signed) D.

Or it may be blank indorsed.

At Edinburgh, the fifteenth day of August, One thousand eight hundred and thirty-four years.

The principal bill above copied was, where payable, duly protested by me, notary-public subscribing, at the instance of the above-named E, banker in Edinburgh, the last indorsee thereto, (*if there is no special indorsation, say by ———, the holder thereof,*) not only against the above-designed C, acceptor, for not payment of the contents, but also against the drawer and indorsers, jointly and severally, for recourse, and against all concerned for interest, damages, and expenses, as accords; (or in case of a bill payable in a different place or country from that in which it is drawn, for exchange, re-exchange, interest, damages, and expenses, as accords); in presence of, &c.

The form of protest for non-payment of a draft or order on a banker does not differ materially from the protest on an unaccepted bill. *Vide* 2 Jurid. Styles, 22.

PROTEST ON A PROMISSORY-NOTE.

L.100 Sterling.

Edinburgh, 12th May 1834.

Three months after date, I promise to pay to A, Merchant in Edinburgh, or order, at the banking-house of Sir Wm. Forbes and Company here, One Hundred Pounds sterling, for value received.

(Signed) B.

At Edinburgh, the twentieth day of August, One thousand eight hundred and thirty-four years.

The principal promissory-note above copied was, where payable, (or if no place of payment is mentioned, in the personal presence, or at the dwelling-house of the said B, farmer in F.) duly protested by me, notary-public subscribing, at the instance of A, therein designed, to whom the same is payable, against the said granter, for non-payment of the contents, and for interest, damages, and expenses, as accords; in presence, &c.

ACT OF HONOUR, whereby a Bill is accepted by the Drawee under Protest, to be written on the Protest, with a copy of the Bill prefixed.

Thereafter the same day, in presence of me, the said notary-public, appeared the said C, who declared, that notwithstanding he would not accept the said bill in the form in which it was drawn to be placed to account of B, yet he would accept the same under protest for honour, and on account of A, the indorser, and protested that the said A, and also the said B, the drawer, should be bound to him, jointly and severally, for his re-imbusement in due form of law, in presence of the said witnesses.

G., N. P.

This form can be easily varied, according as the bill is accepted by some other party than the drawee, or for the honour of the drawer or any of the indorsers.

ACT OF HONOUR IN PAYING A BILL.

Thereafter the same day, in presence of me, the said notary-public, appeared F, merchant in Edinburgh, who offered to pay the contents of the said bill to the said E, the holder thereof, for honour and on account of the said A, underwriter in London, one of the indorsers of the same; and having paid the same accordingly, he protested that the said acceptor and drawer of the said bill, and the said A, should

remain jointly and severally bound to him in like manner as they had been to the said holder, in presence of the witnesses foresaid.

G., N. P.

PROTEST FOR NON-DELIVERY OF A BILL.

On the day of , before me, notary-public, appeared A, merchant in Edinburgh, who declared, that on the day of last, he left for acceptance, agreeably to usage and custom, with B, merchant there, a bill, dated the day of drawn by C. on the said B, for the sum of L.100 sterling, and payable after date, and indorsed to the said A, and that he the said A. had repeatedly sent to get back the same, accepted or unaccepted, (*if the bill has fallen due, say, or to receive payment of the amount,*) but without success; wherefore he required me to demand delivery thereof, accepted or unaccepted, (*if the bill have fallen due, say, or payment of the contents thereof,*) and, in default, to protest in conformity; whereupon I passed to the dwelling-place of the said B, and there speaking to, (*mention the person,*) I demanded delivery of the said bill, accepted or unaccepted, (*or if it had fallen due, or payment of the contents thereof,*) to which demand I received for answer, (*state the answer given.*) Wherefore I, the said notary-public, at the request foresaid, have protested as well against the said B, and the drawer of the said bill, as all others whom it may concern, for non-acceptance and not delivery (*and if the bill has fallen due, for non-payment*) of the said bill, and for exchange, re-exchange, interest, damages and expenses, as accords. This done and protested in presence of

No. III.

HORNING AND POINDING.

LETTERS of HORNING and POINDING on a PROTEST registered in the Books of Council and Session.

GEORGE, &c. WHEREAS, our lovite A, merchant in Edinburgh, by his bill, dated the day of drawn by him upon (and accepted by) B, merchant in Leith, ordered the said acceptor, three months after date, to have paid to him, the drawer, or his order, the sum of Fifty Pounds sterling, for value received; which

bill was duly protested at the instance of our said lovite for not payment, &c., and the instrument of protest taken thereupon registered in the books of our Council and Session, and a decree of the Lords thereof, of this date, interponed thereto; as the same, ordaining these our letters, in manner under written, and other necessary execution, to pass thereon, more fully bears. OUR WILL IS HEREOF, and we charge you, that on sight hereof ye pass, and in our name and authority lawfully command and charge the said B, personally, or at his dwelling-place, to make payment to the complainer of the foresaid principal sum of Fifty Pounds sterling, and the legal interest thereof from and since the said bill fell due and till payment, after the form and tenor of the said bill, registered protest and decree, in all points, within six days next after they are charged by you to that effect, under the pain of rebellion and putting him to the horn; wherein if he fail, the said space being elapsed, that immediately thereafter ye denounce him our rebel, put him to the horn, and use the whole other order against him prescribed by law; attour that ye lawfully fence, arrest, apprise, compel, &c. Then follows a warrant of arrestment, as in other letters of horning and poinding.

Note.—In the case of a bill or note subscribed by a company, letters of horning and poinding are issued in practice against the company by the firm under which they have subscribed, “as well as the individual partners thereof;” and such letters afford a warrant, expressed in the general terms now mentioned, for charging any of the individual partners, and for attaching the funds either of the company or of individual partners.

NARRATIVE of a HORNING and POINDING by an Indorsee against the Acceptor, Drawer and Indorser.

GEORGE, &c. WHEREAS B, by his bill, dated the day of drawn by our lovite A, upon, and accepted by C, ordered him, three months after date, to pay to him, the drawer or order, the sum of Fifty Pounds sterling for valued received; which bill was by the said drawer indorsed to our said lovite A, and duly protested, at his instance, against the said acceptor, drawer and indorser, jointly and severally, for not payment, &c.; and the instrument of protest taken thereupon was duly registered, &c.

Note.—If any one of the parties has subscribed by initials, or by a mark, or has become bound in any of the other modes already described as forming only the ground of an ordinary action, horning and other summary diligence, and of course the will of the letters, proceed

only against the other obligants, in the same way as if the party now mentioned had not been bound at all.

NARRATIVE of HORNING and POINDING, at the Instance of an Indorser, upon a Protest and Receipt for the value from a posterior Indorsee.

GEORGE, &c. WHEREAS B, by his bill, dated the day of drawn by him upon, and accepted by C, ordered the said acceptor, three months after date, to pay to D, or order, the sum of Fifty Pounds sterling, for value received; which bill was indorsed by the said D to our said lovite, and by him to E, at whose instance it was duly protested against the said acceptor for non-payment, and against the drawers and indorsers, jointly and severally, for recourse, &c.: And the said bill was accordingly paid by the complainer to the said E, the protesting indorsee, conform to receipt for the value, dated the day of as the said protest, registered in the books of our Council and Session, &c.

NARRATIVE of HORNING and POINDING, at the Instance of an Indorsee, upon Intimation of the Dishonour from the protesting Indorsee.

GEORGE, &c. Whereas it is humbly meant, &c. by our lovite A, that B, by his bill, dated the day of drawn by him upon, and accepted by C, ordered the said acceptor, one month after date, to have paid to A, the complainer, or order, the sum of L. for value received; which bill was indorsed by A, the complainer, to D, at whose instance the same was duly protested against the said acceptor for non-payment, and against the drawer and A, complainer, as prior indorser, jointly and severally, for recourse, and afterwards returned by the said D, the protesting indorsee, upon A, the complainer, with a notification of the dishonour, as appears from his missive letter to the complainer, dated the whereby the complainer obtained good right to have execution directed at his instance for payment of the sums contained in the said bill, conform to act of Parliament; as the said protest, registered in the books of Council and Session, &c., and the said missive letter intimating the dishonour, both shewn to the said Lords, have testified: OUR WILL IS HEREOFRE, &c.

N. B.—The narrative only of the horning and poinding has been given in the three last cases; because it is almost entirely in the narrative that it differs from the form first given.

**FORM of HORNING and POINDING on a registered Protest upon
Bank-Notes.**

GEORGE, &c. WHEREAS the banking company, by their bank-note or bill, dated the day of numbered and subscribed by their authority and in their name by C, their cashier, promised to pay to D, or bearer, on demand, at their offices in the sum of Twenty shillings sterling for value: And whereas the said banking company also issued a variety of other notes for the same sum of twenty shillings each, and of the same date, tenor and contents, and particularly fifty such notes, numbered as under, viz. numbers (here insert the numbers of the 50 notes,) all of which notes, being 51 in whole, and amounting to L.51 sterling, were, upon the day of duly protested at the office of the said banking company, in terms of the act 5 Geo. III. c. 49, at the instance of our lovite A, the bearer, for not payment of the contents, and for interest till payment; and the instrument of protest taken thereupon was registered in the books of our Council and Session, and a decree of the Lords thereof, of this date, interponed thereto; as the same, ordaining these our letters, in manner under written, and all other necessary execution, in itself more fully bears: OUR WILL IS, and we charge you, that on sight hereof ye pass, and in our name and authority lawfully command and charge the said banking company, and the said C, their cashier, at their place of businesses, and the individual partners of that company, personally, or at their respective dwelling-places, conjunctly and severally, to make payment to the complainer of the foresaid sum of L.51, being the amount of the whole of the said notes protested in manner foresaid, and the legal interest thereof since the date of the said protest, and in time coming till payment, after the form and tenor of the said notes, registered protest and decree interponed thereto, in all points, within six days next after they are respectively charged by you thereto, &c.

Note.—In the case of diligence at the instance of a party residing abroad, although it has been laid down, (*Treatise*, 574,) and, as I think, correctly, that a mandate is not necessary, I am informed, that in the present practice of the Bill-Chamber, a mandate is required before granting warrant for such diligence, and that it is issued on a bill setting forth the mandate. I think it proper to notice this practice, although I do not agree in its correctness.

No. IV.

5 GEO. III. c. 49, § 4, 5 and 6, as to SUMMARY DILIGENCE on Bank-Notes and Bankers' Notes.

Section 4. And for rendering the payment of all notes, accepted bills, post-bills, tickets, tokens or other writings for money, of the nature of a bank or banker's note, circulated, or to be circulated, as specie, in that part of the united kingdom, more effectual, Be it further enacted, by the authority foresaid, That from and after the passing of this act, summary execution shall proceed upon every such note, accepted bill, post-bill, ticket, token or other writing, at the instance of the holder thereof, against the person or persons, bodies politic or corporate, and the legal administrators of such person or persons liable in payment of the same, not only for the sum or sums therein contained, but also for the interest thereof from the time of demanding payment; and that a protest, taken at the office of the person or persons, bodies politic or corporate, liable in payment of the same, between the hours of nine in the morning and three in the afternoon, for not payment, or for not marking of any such note, accepted bill, post-bill, ticket, token or other writing, shall be registerable in the Courts of Session, or other competent judicatories, at any time within six months after the date of such protest, that letters of horning, upon a charge of six days, and the other usual execution of the law of Scotland, may pass thereupon, in the same manner as is competent by the law of Scotland upon protests of bills of exchange and inland bills duly registered.

5. And be it further enacted, by the authority foresaid, That no suspension, or sist of such charge, or other execution, shall pass but upon a discharge by the holder of the note or notes, accepted bills, post-bills so protested, or upon an offer or tender made to him or her, in the form of an instrument duly signed by a notary-public and two witnesses, of the full contents of such note or notes, bill or bills, with the legal interest thereof from the date of the protest, and also the expenses of the protest, registration and such diligence as shall have followed thereupon, to be certified by an account under the hand of the holder of such note or notes, accepted bills, post-bills, or other writings aforesaid, all in lawful money of Great Britain; saving and reserving always to the person or persons, bodies politic or corporate, who shall make such payment, their action at common law before any competent court for repetition of any overcharge in such account of expenses, and to the person or persons who shall have protested such note or notes, his, her or their action before any competent court for

what farther damage he, she or they may have incurred by the undue delay of payment.

6. And for preventing the unnecessary expense and delay of protesting each note, accepted bill, post-bill, ticket, token or other writing aforesaid separately, Be it enacted, by the authority aforesaid, That the holder of such notes, accepted bills, post-bills, tickets, tokens or other writings, after prefixing to his or her protest the full tenor and contents of any one note, accepted bill, post-bill, ticket, token or other writing aforesaid, issued by the person or persons, bodies politic or corporate, against whom such protest is to be taken, may and shall subjoin thereto the dates and numbers of all other notes or writings aforesaid, of the same tenor or contents whereof he or she shall then demand payment; which protest being duly registered as aforesaid, shall be sufficient warrant for issuing letters of horning, and all other execution of the law, for payment of the contents of the whole notes, accepted bills, post-bills, tickets, tokens or other writings aforesaid so specified in the protest, any law, usage or custom to the contrary notwithstanding.

No. V.

CLAUSES of the Act 55 GEO. III. c. 184, relative to the Stamps upon Bills and Notes, and Protests thereon, with the Schedule of the Amount of Duties imposed on them, and the Exceptions.

Section X. And be it further enacted, That from and after the passing of this act, all instruments for or upon which any stamp or stamps shall have been used of an improper denomination or rate of duty, but of equal or greater value in the whole with or than the stamp or stamps which ought regularly to have been used thereon, shall nevertheless be deemed valid and effectual in the law, except in the cases where the stamp or stamps used on such instruments shall have been specially appropriated to any other instrument, by bearing its name on the face thereof.

XI. And be it further enacted, That if any person or persons shall make, sign or issue, or cause to be made, signed or issued, or shall accept or pay, or cause or permit to be accepted or paid, any bill of exchange, draft or order, or promissory-note for the payment of money, liable to any of the duties imposed by this act, without the same being duly stamped for denoting the duty hereby charged thereon, he, she or they shall, for every such bill, draft, order or note, forfeit the sum of Fifty pounds.

XII. And be it further enacted, That if any person or persons shall make and issue, or cause to be made and issued, any bill of exchange, draft or order, or promissory-note for the payment of money, at any time after date or sight, which shall bear date subsequent to the day on which it shall be issued, so that it shall not in fact become payable in two months, if made payable after date, or in sixty days, if made payable after sight, next after the day on which it shall be issued, unless the same shall be stamped for denoting the duty hereby imposed on a bill of exchange and promissory-note for the payment of money at any time exceeding two months after date, or sixty days after sight, he, she or they shall, for every such bill, draft, order or note, forfeit the sum of One hundred pounds.

XIII. And for the more effectually preventing of frauds and evasions of the duties hereby granted on bills of exchange, drafts or orders for the payment of money, under colour of the exemption in favour of drafts or orders upon bankers, or persons acting as bankers, contained in the schedule hereunto annexed, be it farther enacted, That if any person or persons shall, after the thirty-first day of August One thousand eight hundred and fifteen, make and issue, or cause to be made and issued, any bill, draft or order, for the payment of money to the bearer on demand, upon any banker or bankers, or any person or persons acting as a banker or bankers, which shall be dated on any day subsequent to the day on which it shall be issued, or which shall not truly specify and express the place where it shall be issued, or which shall not in every respect fall within the said exemption, unless the same shall be duly stamped as a bill of exchange according to this act, the person or persons so offending shall, for every such bill, draft or order, forfeit the sum of One hundred pounds; and if any person or persons shall knowingly receive or take any such bill, draft or order, in payment of, or as a security for the sum therein mentioned, he or they shall, for every such bill, draft or order, forfeit the sum of Twenty pounds; and if any banker or bankers, or any person or persons acting as a banker, upon whom any such bill, draft or order shall be drawn, shall pay, or cause or permit to be paid, the sum of money therein expressed, or any part thereof, knowing the same to be post-dated, or knowing that the place where it was issued is not truly specified and set forth therein, or knowing that the same does not, in every respect, fall within the said exemption, then the banker or bankers, or persons so offending, shall, for every such bill, draft or order, forfeit the sum of One hundred pounds, and, moreover, shall not be allowed the money so paid, or any part thereof, in account against the person or persons, by or for whom such bill, draft or order shall be drawn, or his, her or their executors or administrators, or his, her or their assignees or cre-

diters, in case of bankruptcy or insolvency, or any other person or persons claiming under him, her or them.

XIV. And be it further enacted, That from and after the thirty-first day of August, One thousand eight hundred and fifteen, it shall be lawful for any banker or bankers, or other person or persons who shall have made and issued any promissory-notes for the payment to the bearer on demand of any sum of money not exceeding One hundred pounds each, duly stamped according to the directions of this act, to re-issue the same from time to time, after payment thereof, as often as he, she, or they shall think fit, without being liable to pay any farther duty in respect thereof; and that all promissory-notes, so to be re-issued as aforesaid, shall be good and valid, and as available in the law, to all intents and purposes, as they were upon the first issuing thereof.

XV. And be it further enacted, That no promissory-note for the payment to the bearer on demand of any sum not exceeding One hundred pounds, which shall have been made and issued by any bankers or other persons in partnership, and for which the proper stamp-duty shall have been paid according to the provisions of this act, shall be deemed liable to the payment of any farther duty, although the same shall be re-issued by and as the note of some only of the persons who originally made and issued the same, or by and as the note of any one or more of the persons who originally made and issued the same, and any other person or persons in partnership with him or them jointly; nor although such note, if made payable at any other than the place where drawn, shall be re-issued with any alteration therein only of the house or place at which the same shall have been at first made payable.

XVIII. And be it further enacted, That from and after the thirty-first day of August One thousand eight hundred and fifteen, it shall not be lawful for any banker or bankers, or other person or persons, to issue any promissory-note for the payment of money to the bearer on demand, liable to any of the duties imposed by this act, with the date printed therein; and if any banker or bankers, or other person or persons, shall issue, or cause to be issued any such promissory-note with the date printed therein, he or they shall, for every promissory-note so issued, forfeit the sum of Fifty pounds.

XIX. Provides, That promissory-notes, bills and other documents not allowed to be re-issued, or not re-issuable after a certain period, shall, upon payment, be cancelled; and it enacts certain penalties for re-issuing and not cancelling.

XX. And be it further enacted, That all promissory-notes and bank post-bills, which shall be issued by the Governor and Company of the Bank of England from and after the thirty-first day of August

One thousand eight hundred and fifteen, shall be freed and exempted from all the duties hereby granted ; and that it shall be lawful for the said Governor and Company to re-issue any of their notes, after payment thereof, as often as they shall think fit.

XXI. and XXII. Regulate the composition payable by the Bank of England.

“ XXIII. And be it further enacted, That from and after the thirty-first day of August One thousand eight hundred and fifteen, it shall be lawful for the Governor and Company of the Bank of Scotland, and the Royal Bank of Scotland, and the British Linen Company in Scotland, respectively, to issue their promissory-notes for the sum of One Pound, One Guinea, Two Pounds, and Two Guineas, payable to the bearer on demand, on unstamped paper, in the same manner as they were authorised to do by the foresaid act of the forty eighth year of his Majesty's reign ;” these banks keeping account of, and paying duties for the notes so issued by them in manner mentioned by the said act. The same section farther allows them to re-issue such promissory-notes respectively, from time to time after the payment thereof, as often as they shall think fit.

XXIV. to XXVIII. both inclusive, contain regulations with regard to granting licences to bankers for issuing notes.

XXIX. And be it further enacted, That from and after the passing of this act, promissory-notes for the payment of money to the bearer on demand made out of Great Britain, or purporting to be made out of Great Britain, or purporting to be made by or on behalf of any person or persons resident out of Great Britain, shall not be negotiable or be negotiated, or circulated or paid in Great Britain, whether the same shall be made payable in Great Britain, or not, unless the same shall have paid such duty, and be stamped in such manner as the law requires for promissory-notes of the like tenor and value made in Great Britain ; and if any person or persons shall circulate or negotiate, or offer in payment, or shall receive or take in payment any such promissory-note, or shall demand or receive payment of the whole or any part of the money mentioned in such promissory-note, from or on account of the drawer thereof, in Great Britain, the same not being duly stamped as aforesaid ; or if any person or persons in Great Britain shall pay, or cause to be paid, the sum of money expressed in any such note, not being duly stamped as aforesaid, or any part thereof, either as drawer thereof, or in pursuance of any nomination or appointment for that purpose therein contained, the person or persons so offending shall, for every such promissory-note, forfeit the sum of Twenty pounds : Provided always that this clause shall not extend to promissory-notes made and payable only in Ireland.

SCHEDULE OF STAMP-DUTIES ON BILLS OF EXCHANGE AND
PROMISSORY-NOTES.

Inland bill of exchange, draft or order to the bearer, or to order, either on demand or otherwise, not exceeding two months after date, or sixty days after sight, of any sum of money.

Amounting to 40s. and not exceeding	£.5, 5s.....£.0	1	0
Exceeding £.5, 5s. _____	20	0	1 6
_____ 20 _____	30	0	2 0
_____ 30 _____	50	0	2 6
_____ 50 _____	100	0	3 6
_____ 100 _____	200	0	4 6
_____ 200 _____	300	0	5 0
_____ 300 _____	500	0	6 0
_____ 500 _____	1000	0	8 6
_____ 1000 _____	2000	0	12 6
_____ 2000 _____	3000	0	15 0
_____ 3000 _____	.....	1	5 0

Inland bill of exchange, draft, or order, for the payment to the bearer, or to order, at any time exceeding two months after date, or sixty days after sight, of any sum of money.

Amounting to 40s. and not exceeding	£.5, 5s.....£.0	1	6
Exceeding £.5, 5s. _____	20	0	2 0
_____ 20 _____	30	0	2 6
_____ 30 _____	50	0	3 6
_____ 50 _____	100	0	4 6
_____ 100 _____	200	0	5 0
_____ 200 _____	300	0	6 0
_____ 300 _____	500	0	8 6
_____ 500 _____	1000	0	12 6
_____ 1000 _____	2000	0	15 0
_____ 2000 _____	3000	1	5 0
_____ 3000 _____	.....	1	10 0

Inland bill, draft, or order for the payment of any sum of money, though not payable to the bearer or to order, if the same shall be delivered to the payee, or some person on his or her behalf, } The same duty as on a bill of exchange for the like sum payable to bearer or to order.

Inland bill, draft, or order, for the payment of any sum of money, weekly, monthly, or at any other stated periods, if made payable to the bearer or to order, or if delivered to the payee, or some person on his or her behalf, where the total amount of the money thereby made payable shall be specified therein, or can be ascertained therefrom. } The same duty as on a bill payable to bearer or order on demand, for a sum equal to such total amount.

And where the total amount of the money thereby made payable shall be indefinite, } The same duty as on bills on demand for the sum therein expressed only.

And the following instruments shall be deemed and taken to be inland bills, drafts, or order, for the payment of money, within the intent and meaning of this schedule, viz.

All drafts or orders for the payment of any sum of money by a bill or promissory-note, or for the delivery of any such bill or promissory-note in payment or satisfaction of any sum of money, where such drafts or orders shall require the payment or delivery to be made to the bearer or to order, or shall be delivered to the payee, or some person on his or her behalf.

All receipts given by any banker or bankers, or other person or persons, for money received, which shall entitle, or be intended to entitle the person or persons paying the money, or the bearer of such receipts, to receive the like sum from any third person or persons.

And all bills, drafts, or orders, for the payment of any sum of money out of any particular fund which may or may not be available, or upon any condition or contingency which may or may not be performed or happen, if the same shall be made payable to the bearer or to order, or if the same shall be delivered to the payee, or some other person on his or her behalf.

Foreign bill of exchange, (or bill of exchange drawn in, but payable out of Great Britain,) if drawn singly and not in a set, } The same duty as on inland bill of the same amount and tenor.

Foreign bills of exchange drawn in sets, according to the custom of merchants, for every bill of each set, where the sum payable thereby shall not exceed L.100, - - - - - L.0 1 6

And where it shall exceed	£.100 and not exceed	£.200	.....	0	3	0	
_____	200	_____	500	.....	0	4	0
_____	500	_____	1000	.....	0	5	0
_____	1000	_____	2000	.....	0	7	6
_____	2000	_____	3000	.....	0	10	0
_____	3000	_____		.....	0	15	0

EXEMPTIONS from the preceding and all other Stamp-duties.

All bills of exchange or bank post-bills issued by the Governor and Company of the Bank of England.

All bills, orders, remittances and remittance-certificates, drawn by commissioned officers, masters and surgeons in the navy, or by any commissioner or commissioners of the navy, under the authority of the

act passed in the 35th year of his Majesty's reign, for the more expeditious payment of the wages and pay of certain officers belonging to the navy.

All bills drawn, pursuant to any former act or acts of Parliament, by the commissioners of the navy, or by the commissioners for victualing the navy, or by the commissioners for managing the transport service, and for taking care of the sick and wounded seamen, upon and payable by the treasurer of the navy.

All drafts or orders for the payment of any sum of money to the bearer on demand, and drawn upon any banker or bankers, or any person or persons acting as a banker, who shall reside and transact the business of a banker within ten miles (by 9 Geo. IV. c. 49, § 15, within fifteen miles) of the place where such drafts or order shall be issued; provided such place shall be specified in such drafts or orders; and provided the same shall bear date on or before the day on which the same shall be issued; and provided the same do not direct the payment to be made by bills or promissory-notes.

All bills for the pay and allowance of his Majesty's land forces, or for other expenditures liable to be charged in the public regimental or district accounts, which shall be drawn according to the forms now prescribed, or hereafter to be prescribed by his Majesty's orders, by the paymasters of regiments or corps, or by the chief paymaster, or deputy paymaster, and accountant of the army depot, or by the paymasters of recruiting districts, or by the paymasters of detachments, or by the officer or officers authorised to perform the duties of the paymastership during a vacancy, or the absence, suspension, or incapacity of any such paymaster as aforesaid; save and except such bills as shall be drawn in favour of contractors or others who furnish bread or forage to his Majesty's troops, and who, by their contracts or agreements, shall be liable to pay the stamp-duties on the bills given in payment for the articles supplied by them.

PROMISSORY-NOTE for the payment *to the bearer on demand* of any sum of money

Not exceeding £.1, 1s, ...	£.0	0	5
Exceeding 1, 1s. and not exceeding £.2, 2s.	0	0	10
2, 2s.	5, 5s.	0	1 3
5, 5s.	10	0	1 9
10	20	0	2 0
20	30	0	3 0
30	50	0	5 0
50	100	0	8 6

Which said notes may be re-issued after payment thereof as often as shall be thought fit.

PROMISSORY-NOTE for the payment in *any other manner than to the bearer on demand*, but not exceeding two months after date, or sixty days after sight, of any sum of money

Amounting to 40s. and not exceeding	£.5, 5s.	£.0 1 0
Exceeding £.5, 5s. _____	20	0 1 6
_____ 20 _____	30	0 2 0
_____ 30 _____	50	0 2 6
_____ 50 _____	100	0 3 6

These notes are not to be re-issued after being once paid.

PROMISSORY-NOTE for the payment *either to the bearer on demand, or in any other manner than to the bearer on demand*, but not exceeding two months after date, or sixty days after sight, of any sum of money

Exceeding	£.100, and not exceeding	£.200	£.0 4 6
_____	200 _____	300	0 5 0
_____	300 _____	500	0 6 0
_____	500 _____	1000	0 8 6
_____	1000 _____	2000	0 12 6
_____	2000 _____	3000	0 15 0
_____	3000 _____	.....	1 5 0

These notes are not to be re-issued after being once paid.

PROMISSORY-NOTE for the payment to the bearer, or otherwise, at *any time exceeding two months after date, or sixty days after sight*, of any sum of money

Amounting to 40s., and not exceeding	£.5, 5s.	£.0 1 6
Exceeding £.5, 5s. _____	20	0 2 0
_____ 20 _____	30	0 2 6
_____ 30 _____	50	0 3 6
_____ 50 _____	100	0 4 6
_____ 100 _____	200	0 5 0
_____ 200 _____	300	0 6 0
_____ 300 _____	500	0 8 6
_____ 500 _____	1000	0 12 6
_____ 1000 _____	2000	0 15 0
_____ 2000 _____	3000	1 5 0
_____ 3000 _____	.....	1 10 0

These notes are not to be re-issued after being once paid.

Promissory-note for the payment of any sum of money by instalments, or for the payment of several sums of money at different days or times, so that the whole of the money so to be paid shall be definite and certain,

The same duty as on a promissory-note payable in less than two months after date, for a sum equal to the whole amount of the money to be paid.

And the following instruments shall be deemed and taken to be promissory-notes within the meaning and intent of this schedule, viz.

All notes promising the payment of any sum or sums of money out of any particular fund, which may or may not be available, or upon any condition or contingency which may or may not be performed or happen, if the same shall be made payable to the bearer or order, and if the same shall be definite and certain, and not amount in the whole to Twenty pounds.

And all receipts for money deposited in any bank, or in the hands of any banker or bankers, which shall contain any agreement or memorandum importing that interest shall be paid for the money so deposited.

EXEMPTIONS from the DUTIES on PROMISSORY-NOTES.

All notes promising the payment of any sum or sums of money out of any particular fund, which may or may not be available, or upon any condition or contingency, which may or may not be performed or happen, where the same shall not be made payable to the bearer or to order, and also where the same shall be made payable to the bearer or to order, if the same shall amount to twenty pounds, or be indefinite.

And all other instruments bearing in any degree the form or style of promissory-notes, but which in law shall be deemed special agreements, except those hereby expressly directed to be deemed promissory-notes.

But such of the notes and instruments here exempted from the duty on promissory-notes shall nevertheless be liable to the duty which may attach thereon as agreements or otherwise.

EXEMPTIONS from the preceding, and all other STAMP-DUTIES.

All promissory-notes for the payment of money issued by the Governor and Company of the Bank of England.

PROTEST of any BILL of EXCHANGE or PROMISSORY-NOTE for any sum of money.

Not amounting to L. 20, ...	L. 0	2	0
Amounting to L. 20, and not amounting to L. 100, ...	0	3	0
100, ... 500, ...	0	5	0
500, or upwards, ...	0	10	0

3 £ 2

No. VI.

58 GEO. III. c. 93.

An Act to afford Relief to the bona fide Holders of Negotiable Securities, without Notice that they were given for a usurious consideration.

WHEREAS, by the laws now in force, all contracts and assurances whatsoever, for payment of money, made for a usurious consideration, are utterly void; and whereas, in the course of mercantile transactions, negotiable securities often pass into the hands of persons who have discounted the same without any knowledge of the original considerations for which the same were given; and the avoidance of such securities in the hands of such *bona fide* indorsees without notice is attended with great hardship and injustice; for remedy thereof, be it enacted by the King's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, That no bill of exchange, or promissory-note, that shall be drawn or made after the passing of this act, shall, though it may have been given for a usurious consideration, or upon a usurious contract, be void in the hands of an indorsee for valuable consideration, unless such indorsee had, at the time of discounting or paying such consideration for the same, actual notice that such bill of exchange or promissory-note had been originally given for a usurious consideration, or upon a usurious contract.

No. VII.

2 AND 3 WILLIAM IV. c. 98.

WHEREAS doubts having arisen as to the place in which it is requisite to protest for non-payment of bills of exchange, which, on the presentment for acceptance to the drawee or drawees, shall not have been accepted, such bills of exchange being made payable at a place other than the place mentioned therein to be the residence of the drawee or drawees thereof, and it is expedient to remove such doubts, be it therefore enacted, by the King's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Com-

mons, in this present Parliament assembled, and by the authority of the same, That from and after the passing of this act, all bills of exchange, wherein the drawer or drawers thereof shall have expressed that such bills of exchange are to be payable in any place other than the place by him or them therein mentioned to be the residence of the drawee or drawees thereof, and which shall not, on the presentment for acceptance thereof, be accepted, shall or may be, without further presentment to the drawee or drawees, protested for non-payment in the place in which such bills of exchange shall have been by the drawer or drawers expressed to be payable, unless the amount owing upon such bills of exchange shall have been paid to the holder or holders thereof on the day on which such bills of exchange would have become payable, had the same been duly accepted.

No. VIII.

EXCERPT from the STATUTE 5 and 6 WILL. IV. c. 41, entitled, "An Act to amend the Law relating to Securities given for considerations arising out of gaming, usurious, and other illegal transactions."

Section 4. After reciting the statutes 16 Car. II. c. 7, and 9 Ann. c. 14, which nullify all securities or obligations granted for money lost at play, and the 12 Ann. st. 2, c. 16, which nullifies all securities or obligations granted for usurious considerations, as well as other enactments therein recited relative to other unlawful considerations; and in particular, the 45 Geo. III. c. 72, which declares all contracts or agreements, bills, notes, or other securities granted for the ransom of captured vessels or merchandize, and the 6 Geo. IV. c. 10, which declares all contracts or securities by a bankrupt or other person to or in trust for a creditor, or for securing payment of a debt by the bankrupt to the creditor, as an inducement to the creditor to agree to or sign his certificate, to be null and void; and farther narrating, ' that securities and instruments made void by these several statutes, ' other than bills of exchange or promissory-notes, made valid by the ' 58 Geo. III. c. 93, (already referred to,) are sometimes indorsed, ' transferred, assigned, or conveyed to purchasers or other persons for ' a valuable consideration, without notice of the original consideration for which such securities or instruments were given; and the ' avoidance of such securities or instruments in the hands of such purchasers or other persons, is often attended with great hardship and

' injustice, therefore enacts, That so much of the said recited acts
' as enacts, That any note, bill or mortgage shall be absolutely void,
' shall be, and the same is hereby repealed; but, nevertheless, every
' note, bill, or mortgage, which, if this act had not been passed, would,
' by virtue of the said several lastly herein-before-mentioned acts, or
' any of them, have been absolutely void, shall be deemed and taken
' to have been made, drawn, accepted, given or executed for an illegal
' consideration, and the said several acts shall have the same force and
' effect which they would respectively have had, if, instead of enact-
' ing that any such note, bill or mortgage should be absolutely void,
' such acts had respectively provided that every such note, bill or
' mortgage should be deemed and taken to have been made, drawn,
' accepted, given or executed for an illegal consideration, provided
' always, that nothing herein contained shall prejudice or affect any
' note, bill or mortgage, which would have been good and valid if this
' act had not been passed.'

' 2. And be it further enacted, That in case any person shall, after
' the passing of this act, make, draw, give or execute any note, bill or
' mortgage, for any consideration, on account of which the same is,
' by the herein-recited acts, (as particularly specified,) by any one or
' more of such acts, declared to be void, and such person shall actually
' pay to any indorsee, holder or assignee of such note, bill or mort-
' gage, the amount of the money thereby secured, or any part thereof,
' such money so paid shall be deemed and taken to have been paid
' for and on account of the person to whom such note, bill or mort-
' gage was originally given upon such illegal consideration as afore-
' said, and shall be deemed and taken to be a debt due and owing
' from such last-named person to the person who shall so have paid
' such money, and shall accordingly be recoverable by action at law
' in any of his Majesty's courts of record.'

No. IX.

LIST OF THE NUMBER OF DAYS OF GRACE ALLOWED IN DIFFERENT COUNTRIES OF EUROPE.

Altona,	Sundays and holidays included. Bills falling due on a Sunday or holiday must be paid, or in default thereof protested on the day previous, - - -	} 12 days.
America,	- - - - -	
Amsterdam,	Abolished since the Code Napoleon,	3 days. none.

Antwerp,	Abolished since the Code Napoleon,	none.
Berlin,	When bills including them do not fall due on a Sunday or holiday, in which case they must be paid or protested the day previous,	3 days.
Brazil,	Rio de Janeiro, Bahia, including Sundays, &c. as in the last case,	15 days.
England, Scotland, Wales, and Ireland,	-	3 days.
France,	Abolished by the Code Napoleon,	none.
Frankfort on the Maine,	Except on bills drawn at sight, Sunday and holidays not included,	4 days.
Genoa,	Abolished by the Code Napoleon,	none.
Hamburg,	Same as Altona,	12 days.
Ireland,	-	3 days.
Leghorn,	-	none.
Lisbon and Oporto,	{ 15 days on local, and 6 on foreign bills; but if not previously accepted, must be paid on the day they fall due,	6 days or 15 days.
Palermo,	-	none.
Petersburgh,	Bills drawn after date are entitled to 10 days' grace, those drawn at sight to only 3 days, and those at any number of days after sight to none. But bills received and presented after they are due, are nevertheless entitled to 10 days' grace. In these days of grace are included Sundays and holidays, as also the day when the bill falls due; on which days they cannot be protested for non-payment, but, on the morning of the last day of grace, payment must be demanded, and if not complied with, the bill must be protested before sunset,	10 days, 3 days, &c.
Rotterdam,	Abolished by Code Napoleon,	none.
Scotland,	-	3 days.
Spain,	Vary in different parts of Spain,—generally 14 days on foreign, and 8 on inland bills. At Cadiz only 6 days' grace. When bills are drawn at a certain date, fixed or precise, no days of grace are allowed. Bills drawn at sight are not entitled to any days of grace, nor any bills, unless accepted prior to maturity,	14 days, but vary.

Trieste,	3 days on bills drawn after date, or any term after sight, not less than 7 days, or payable on a particular day, but bills presented after maturity must be paid within twenty-four hours. Sundays and holidays are included in the days of grace; and if the last day of grace fall on such a day, payment must be made, or the bill protested on the first following open day,	3 days.
Venice,	6 days, exclusive of Sundays, holidays, and the days when the bank is shut,	6 days.
Vienna,	Same as Trieste,	3 days.
Wales,	- - - - -	3 days.

Chitty, p. 407, 8th edit.

No. X.

PERIODS OF USANCE ALLOWED BETWEEN DIFFERENT COUNTRIES OF EUROPE.

Usance between			
London and	Aleppo,	{ sometimes accounted } as treble usance, is }	1 calendar month after date.
	Altona is		1 calendar month after date.
	America, North,		said to be 60 days.
	Amsterdam,		1 calendar month after date.
	Antwerp,	1 do.	do.
	Berlin,		14 days after acceptance.
	Bilboa,		2 calendar months after date.
	Brabant,	1 do.	do.
	Bruges,	1 do.	do.
	Cadiz,		2 calendar months after date.
	Constantinople } and Smyrna, }	31 days	do.
	Flanders,	1 calendar month	do.
	France,	30 days	do.
	Frankfort on } the Maine, }	14 days after acceptance.	
	Florence, {	sometimes accounted } as treble usance, }	30 days after date.
	Genoa,		3 calendar months after date.
	(Stated in Molloy as 2 months after date).		

Usance between
London and

Geneva,	1	calendar month	after date.
Hamburgh,	1	do.	do.
Holland,	1	do.	do.
Leghorn,	3	do.	do.
Lisbon,	2	do.	do.
Lisle,	1	do.	do.
Lucca, sometimes	3	do.	do.
Madrid and all Spain, }	2	do.	do.
Middleburgh,	1	do.	do.
Milan,	3	do.	do.
Palermo,	3	do. or 90 days	do.
Petersburgh,	none.		
Portugal,	2	calendar months	after date.
Paris,	1	do.	do.
Rotterdam,	1	do.	do.
Rome,	3	do.	do.
Rouen,	1	do.	do.
Spain,	2	do.	do.
Trieste,	same as	Vienna.	
Venice,	3	calendar months	after date.
Vienna,	14	days	after acceptance.
West Indies,	31	do.	do.
Zante,	3	calendar months	after date.
Zealand,	1	do.	do.

Usance between
Amsterdam and

Brabant, France, Flanders, and Holland or Zealand,
1 calendar month.
Italy, Spain and Portugal, 2 calendar months.
Frankfort, Nuremburgh, Vienna, and other places in
Germany, on Hamburgh and Breslau, 14 days
after sight, 2 usances, 28 days, and half usance,
7 days.

Chitty, p. 405, 8th edition.

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ERRATA.

The Reader is requested to correct the following errata with his pen.

Page.

- 6, note 8, *for Black read Block.*
- 12, note 1, *after 5 B. and Cr. add 360.*
- 14, note 2, *for 3 Dow, 319, read 3 Dow, 218.*
- 86, note 5, *add and 4 Dougl. 247.*
- 92, note 1, *for 75 read 62.*
- 96, note 1, *for Wright read Wight.*
- 107, note 3, *for Kidd read Reid.*
- 117, line first from the foot, *after the word valid, add 9.*
- 124, note 3, *for 145 read 123.*
- 127, note 1, line 1, *for § 30, read § 31.*
- 147, note 1, *for Solaste read Solarte.*
- 153, line 6, *for Will. III. read Will. IV.*
- 174, note 1, *for 5 read 2.*
- 181, note 1, *for Anderson read Alderson.*
- 186, line 1, *after 1 Ann. add St. 2, c. 22.*
- 204, note 1, *for Stevenson read Stevens.*
- 221, note 1, *for 94-5 read 80.*
- 222, note 1, *for Leslie read Little.*
- 235, note 4, *for Ray. read Pay.*
- 236, note 1, *for Clinton read Clifton.*
- 246, note 4, *before C. and Pay. insert 1.*
- 269, note 5, *ad fin. for Walters read Watters.*
- 278, note 7, *after 1 Bell, add 376.*
- 284, note 4, *add v. i. p. 402.*
- 317, note 1, *for note 3, read note 2.*
- 326, note 5, *for Gordon read Eadon.*
- 365, line 10, *after debtor insert 3.*
- 366, line 13 from the foot, *after the words, "on the ground of a" add, doubt of Lord Eldon as to that case, and—and cancel line 12 from the foot.*
- 366, note 4, *for England read Ireland.*
- 375, note 1, *for Archer read Ancher.*
- 376, note 2, *for 340 read 310.*
- 392, note 1, line 4, *for their read there.*
- 398, note 7, *for Stott read Watt.*
- 435, note 5, line 5, *for 2 read 3.*
- 439, note 6, *ad finem, for Boulton read Boulbee.*
- 540, note 1, line 4, *for 1 read 2.*
- 547, note 1, line 4, *for 1 read 10.*
- 559, note 6, *for 4 read 5.*
- 582, note 1, *for 582 read 583.*
- 626, note 5, *for Gordon read Garden.*
- 638, note 5, *for Blair read Black, and for Shaw read Shand.*
- 649, line 12 from top, *for death read oath.*
- 654, note 3, *for 1830 read 1730.*
- 658, line 4 from foot, *after the word "statute," subjoin in a note, (°) Armstrong v. Johnstone, 16th May 1804, Mor 11148.*
- 731, note 3, on lines 1 and 2, *for 731 read 730.*
- 804, Appendix, No. VII., *instead of 2 and 3 read 3 and 4 Will. IV.*
- 812-13, Index, *instead of Nos. 5, 6, 7, 8 of paragraphs, read 4, 5, 6, 7.*
- 816, line 44, *for there, read abroad.*
- 832, line 27, *after "gaming debts," add 116.*

